

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** R. v. Assoun, 2006 NSCA 47

**Date:** 20060420

**Docket:** CAC 159286

**Registry:** Halifax

**Between:**

Glen Eugene Assoun

Appellant

v.

Her Majesty The Queen

Respondent

**Judges:**

Roscoe, Hamilton and Fichaud, JJ.A.

**Appeal Heard:**

January 17, 2006, in Halifax, Nova Scotia

**Held:**

Appeal is dismissed per reasons for judgment by the Court

**Counsel:**

Jerome P. Kennedy, Q.C., for the appellant  
Dana Giovannetti, Q.C., for the respondent

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**Reasons for judgment: (By the Court)**

**Background**

[1] On September 17, 1999, the appellant, Glen Assoun, was convicted by a jury of second degree murder of his former girlfriend Brenda LeAnne Way. The trial judge, Justice Suzanne Hood, sentenced him to imprisonment for life with no possibility of parole for 18½ years.

[2] The partially clad body of Ms. Way, a 28 year old prostitute, was found behind an apartment building at 109 Albro Lake Road, Dartmouth, at approximately 7:30 a.m. on Sunday, November 12, 1995. She had been stabbed several times and her throat was cut.

[3] The appellant was charged with first degree murder of Ms. Way on March 25, 1998. He was represented by Donald Murray, Q.C., experienced criminal law counsel, during the preliminary inquiry in August 1998, for eight days of pre-trial motions and *voir dires*, and for the first three days of trial before a jury. On the fourth day of trial, Friday, June 4, 1999, Mr. Assoun advised the trial judge that he had dismissed Mr. Murray and wished to represent himself. After further discussion, the matter was adjourned for the weekend to give Mr. Assoun the opportunity to reconsider his position and to consult with other counsel.

[4] On Monday, June 7, 1999 the appellant sought a mistrial so that he could have time to find new counsel and start the trial over from the beginning. After a lengthy discussion concerning the availability and suitability of various counsel and whether Mr. Assoun would seek a new legal aid certificate, the matter was adjourned until Wednesday to allow the appellant time to find replacement counsel.

[5] On June 9<sup>th</sup> Mr. Atherton appeared as legal counsel for the appellant and requested that a mistrial be declared and that the trial start over in September. During a lengthy discussion between counsel and the trial judge various other options were explored. The Crown and the trial judge were prepared to agree to an

adjournment to late August or early September. After a private discussion with Mr. Assoun, Mr. Atherton advised the judge that he could not make the time commitment being stipulated by Mr. Assoun and that Mr. Assoun would therefore represent himself. The trial judge encouraged Mr. Assoun to continue to seek other counsel and to apply for a new legal aid certificate. The matter was adjourned to June 10<sup>th</sup> to instruct the jury about the adjournment. At that time Justice Hood provided the appellant with lengthy instructions on trial procedure and the procedure for subpoenaing witnesses. The trial was adjourned to August 23<sup>rd</sup>. On that date Mr. Assoun advised that he would be representing himself.

[6] The trial continued through September 17, 1999 for a total of 36 days. The crucial issue was the identity of the assailant. No one witnessed the murder. The Crown's position was that the volatile relationship between Mr. Assoun and Ms. Way had been deteriorating for several months, that he was threatening and assaultive, and motivated primarily by anger and jealousy concerning the end of the relationship and her relationships with other men. Mr. Assoun had been charged with assaulting Ms. Way in October 1995 and an appearance notice to attend Provincial Court had been issued. There was substantial evidence to the effect that he was near the scene of the crime on the night of the murder. In addition, four witnesses testified to the appellant's admission to each that he had killed the deceased.

[7] The position of the appellant was that he was not the killer and an alibi witness testified that he had been with her all night on the night of the murder.

### **Summary of trial evidence**

#### a. relationship with accused

[8] The appellant and Ms. Way lived together at the Four Star Motel in Dartmouth until sometime in the summer of 1995. Numerous witnesses testified about arguments and physical altercations between the two and of the appellant throwing Ms. Way's clothes over the balcony of the hotel. At the time of the murder, Ms. Way was living with her father on Victoria Road. A month before the murder Mr. Assoun was charged with assaulting Ms. Way. He was served on October 13, 1995 with an appearance notice for December 19, 1995.

#### b. the crime scene - medical evidence

[9] Constable Randy MacDonald, the first police officer on the scene, testified that he recognized the deceased as a street prostitute who usually worked in the north end of Dartmouth. He noted that the deceased's blouse had been pulled up and her pants were down around her ankles and there was substantial blood pooling under her head.

[10] The medical examiner, Dr. Christopher Graham arrived at 109 Albro Lake Road close to 10:00 a.m. He testified that rigor mortis was moderately advanced and the deceased had been dead at least 4-5 hours. Dr. Graham attributed the cause of death to exsanguination from a cut to the neck.

[11] Dr. Charles Hutton, a forensic pathologist called by the Crown, estimated that the time of death was between 4:00 a.m.- 7:30 a.m. He was of the opinion that the victim bled to death from cuts to her neck, one of which severed the jugular vein. The weapon was probably a dull knife. There were defensive wounds on her hands but there was no evidence of sexual assault.

[12] Cathy Valade, a former girlfriend of Mr. Assoun, testified that sometime following Ms. Way's death, Mr. Assoun told her that he lost the knife he usually carried in his boot and had asked Corey Tuma to make him a new one. Mr. Tuma denied that. Mr. Tuma testified that the appellant had asked to borrow a knife from him prior to the murder. As well, Ms. Way's sister, Jane Downey testified that she found a knife in a wooded area near the crime scene a year and half after the murder. The knife had a broken tip but contained no fingerprints or blood.

c. Ms. Way's movements November 11- 12, 2005

[13] Several witnesses testified about the whereabouts of both the appellant and Ms. Way on November 11<sup>th</sup>, the night before she was murdered. Mr. Tuma, the clerk at the Four Star saw Ms. Way there around 10:00 p.m. Mr. Tuma also said that Mr. Assoun was there later that night looking for Ms. Way. On direct he said Mr. Assoun was there after Ms. Way but on cross-examination he admitted that in his police statement he had said that Mr. Assoun had been there before Ms. Way.

[14] Allen McMaster, a cab driver saw Ms. Way hitch-hiking on Prince Albert Road around 8:00 or 8:30 p.m. She came over to his car, they spoke for a few minutes and he gave her a cigarette. At approximately 2:00 a.m. he had a call to

pick up a passenger at the Green Gables store in Highfield Park. He picked up Ms. Way and took her to Lawrence St. She seemed to be looking for someone en route. After they arrived at Lawrence St. she left the cab and got into the passenger side of a red vehicle, either a Blazer or Jimmy, with a silver stripe down the side of it. The vehicle was driven by a man with a beard and a full head of hair.

[15] Another cab driver, Franklyn LeBlanc, saw Ms. Way trying to attract customers on Prince Albert Road around 3:45 - 4:00 a.m.

[16] Barbara Ernst who lived at 117 Albro Lake Road was awakened by her dog, between 3:45-4:30 a.m., when she heard mumbling, like a "rough whisper", and car doors closing and the spinning of rocks in the back parking lot.

d. Mr. Assoun's alibi

[17] Isabel Morse testified that Mr. Assoun moved into her apartment at 40 Lahey Road, Dartmouth during the last week in October, 1995. Mastafa Badakhshan and Jacqueline Gavel also resided there with her. Ms. Morse swore that Mr. Assoun was with her overnight at the apartment on November 11-12, 1995, that he fell asleep at 5 a.m., which she had noted by looking at a clock, and that he was present when she woke up at 1 p.m.

[18] On cross-examination, Ms. Morse was questioned extensively concerning: her relationship with the appellant, which she described as "extremely good friends"; the fact that the appellant had asked her, his own alibi witness, whether she had anything to do with Ms. Way's murder; and on her numerous prior and partially inconsistent statements.

[19] Mr. Badakhshan and Ms. Gavel testified as Crown witnesses. On November 11<sup>th</sup> he drove Ms. Gavel to work at Northwood in Halifax that night at about 10 o'clock and he worked as a taxidriver throughout the night, returning to the apartment at about 5 a.m. He testified that he was "not sure" if Mr. Assoun was at the apartment when he left for work at 10 p.m. Further, he testified that he recalled seeing the appellant after he returned at 5 a.m., "... maybe not right at the arrival . . ."

[20] Ms. Gavel testified that Ms. Morse and Mr. Assoun were at the apartment when she left for work. She returned to the apartment at about 7:15 a.m. and she did not observe whether the appellant was in the apartment at that time.

[21] Margaret Hartrick, a friend of Ms. Way, gave statements to police in November, 1996 and August, 1998 and testified at the preliminary that she saw Mr. Assoun on Albro Lake Rd. at 4:15 a.m. on November 12, 1995 and he told her that Ms. Way was dead. Ms. Hartrick died before trial. After a *voir dire* one of her statements, which was videotaped and given under oath, and her preliminary evidence was admitted as evidence at trial.

e. evidence of admissions by Glen Assoun

[22] Wayne Wise, Mr. Assoun's 32 year old nephew testified that in January, 1997, he phoned Mr. Assoun who was then in Vancouver, to ask him about finding work there. Mr. Wise said that Mr. Assoun told him that he was hiding in British Columbia because he was a suspect in his wife's murder investigation. Mr. Wise asked him "if he did it and he said yes". Mr. Wise was a drug user, had a lengthy criminal record, and his attendance at the Assoun trial was ensured by executing a warrant for his arrest.

[23] Mary Cameron testified that, within the month following the murder, she heard the appellant admit to Cathy Valade, at Valade's apartment, that he killed Brenda Way, "I heard him say that he got her from ear to ear and that the tip of his blade was broke off".

[24] David Carvery, a jailhouse informant, who received consideration respecting a sentencing recommendation for drug offences in exchange for his testimony, testified that Mr. Assoun admitted to him that he had killed his ex-girlfriend by slitting her throat and dumping her body near a dumpster because he was upset with her. Mr. Carvery's girlfriend was a friend of Ms. Way.

[25] M.G., 18 years old at the time of trial, testified that when she had been working as a prostitute in Dartmouth in 1996-1997 she was picked up by a man who she later identified as Mr. Assoun. She stated that the man slit her breast with a knife and raped her. While he was raping her he repeatedly said "Pitbull", which was Ms. Way's nickname. Ms. M.G. asked him if he had killed Pitbull and he said

yes and he would kill her too. She went to the police with this information approximately 18 months later.

f. defence evidence

[26] Mr. Assoun did not testify on his own behalf. In addition to Isabel Morse, whose alibi evidence is summarized above, he called several other witnesses. His first two witnesses, Juan Sanchez and Hector Deagle were inmates with him at the correctional center who were called to rebut the evidence of David Carvery. They indicated that Mr. Assoun kept to himself and they never saw him talking with David Carvery. A correctional officer, Scott Keefe, gave similar evidence.

[27] Linda Grandy was one of the people Margaret Hartrick said she had been with at 109 Albro Lake Rd. just before she met Mr. Assoun on the night of the murder. Ms. Grandy testified that she was not there at that time and she did not know Ms. Hartrick.

[28] Brenda Williams was the sister-in-law of Mr. Assoun. She testified that he was living in Maple Ridge, British Columbia at the time Ms. M.G. said she encountered him in Dartmouth. An esthetician, Cathy Cameron, was called to rebut the evidence of Ms. M.G. who said that the person who assaulted her had a pierced ear. Ms. Cameron indicated that she examined Mr. Assoun's ears and saw no evidence of piercing.

## **Issues**

[29] The issues raised by the appellant can be organized and listed as follows:

**1. Margaret Hartrick's statements**

- a. admissibility of Ms. Hartrick's KBG statement - June 22, 1997 and Preliminary inquiry evidence - August 18, 1998
  - i. failure to edit
  - ii. timing of her written reasons
  - iii. application of principled approach (threshold reliability)
  - iv. multiple statements

- b. jury charge
  - i. adequacy of review of Ms. Hartrick's evidence
  - ii. adequacy of caution
  - iii. review of defence position

## **2. Statements of Brenda Way**

- a. admissibility of statements allegedly made by Ms. Way prior to her death
  - i. sheer volume - redundancy & repetition
  - ii. Downey & Johnston evidence
  - iii. principled analysis on individual basis
- b. jury charge - no caution on how to use hearsay re: motive, etc.

## **3. Vetrovec Warnings**

- a. David Carvery - jailhouse informant
- b. Wayne Wise
- c. Margaret Hartrick

## **4. M.G. evidence**

- a. admission of Ms. M.G.'s evidence
  - i. relevant/prejudicial
  - ii. collateral evidence - re: jewelry, keys, scar
- b. jury charge - permissible use of contextual evidence

## **5. Mary Cameron's evidence (admission)**

- a. insufficient context to be admissible

## **6. Miscellaneous admissibility issues**

- a. threats with and purchase of a gun
  - b. numerous assaults and threats
  - c. Jane Downey's finding of the broken-tipped knife
  - d. vehicle similarity
  - e. evidence that the appellant carried knives
  - f. evidence of the jailhouse informant
  - g. evidence of Wayne Wise
7. **Manslaughter - failure to leave with jury as included offence**
8. **Conduct of Crown Counsel during trial**
9. **Conduct of the trial judge: failure to assist unrepresented accused**
10. **Application to admit new evidence on appeal**

### **Analysis**

#### **1. Margaret Hartrick's statements**

[30] Mr. Assoun generally raised two issues with respect to Ms. Hartrick's evidence. He argued the judge erred in admitting her **KGB** statement and her preliminary inquiry evidence. He also argued the judge's charge to the jury with respect to her evidence was deficient. Ms. Hartrick's evidence was that she saw Mr. Assoun on Albro Lake Road at 4:15 a.m. on November 12, 1995 and he told her that Ms. Way was dead.

- a. admission of Ms. Hartrick's KGB statement and preliminary inquiry evidence

[31] As stated above, Ms. Hartrick was not available to testify at trial. She was assaulted on September 10, 1998, and died on September 18, 1998. She had given a **KGB** statement to police on January 22, 1998 and testified at the preliminary inquiry in August 1998.

[32] A *voir dire* was held while Mr. Assoun was still represented by counsel. The judge was asked to generally determine the admissibility of Ms. Hartrick's **KGB** statement and preliminary inquiry evidence on the principled approach to hearsay. No application was made for the admission of her November 14, 1996 statement to the police. The judge was not asked at that time to edit out those parts of the **KGB** statement or the preliminary inquiry evidence which were inadmissible on other grounds:

MR. MURRAY -- ...One thing that my friend didn't mention, but I spoke with him on the telephone this morning, and with respect to editing that my friend, Mr. Fetterly, has been very clear from the start. **Even if certain things were to go into evidence, there are certain things that would have to be edited out of the material. As counsel, we're prepared to deal with that at a later point, if we have to. And so I'm not going to spend the time, and I presume that's why Mr. MacRury didn't spend the time during his argument, talking about**

-

THE COURT What has to come out.

MR. MURRAY -- which gets edited out and which gets left in. So we'll be dealing with that.

MR. MACRURY That's correct, My Lady. My friend spoke on the phone and that's why I didn't deal with that issue. Because he said that we could deal with it afterward and I think that's appropriate, that we're dealing with the issues of law as opposed to the fine points -

THE COURT Get the big picture and then -

MR. MACRURY Yes.

THE COURT -- see where we go from there.

MR. MACRURY Absolutely, My Lady.

THE COURT      Okay. Thank you.

(Emphasis added)

[33] The *voir dire* ended on Friday May 28, 1999. The judge stated:

. . . I just want to -- we'll need to keep a close eye on our time, you know, for this trial. I don't want to get behind before we begin if we can help it. I had indicated I think when we began this voir dire that all that I might be able to do and perhaps all that's really practical to do is to give a "yes" or "no" answer to the issue I've just reserved on. And I can do that -- obviously I can do that very quickly on Monday. If possible over the weekend, I will try to put something more than that together, but I realize I've got to make up my mind. Whether I get a decision written over the weekend remains to be seen. I also won't have time during the day on Monday to be dealing with it.

[34] On Monday, May 31, 1999, the judge advised:

I had said on Friday that I would reserve decision on the voir dire that concluded on Friday till this morning at 9:30. I will have to reserve further.

I understand that it is anticipated that we will be calling witnesses today and half of tomorrow, so that the openings will not be done until Wednesday. I'm sorry to delay the decision further, but I will give the decision tomorrow at -- I will do it at 9 o'clock. I don't want to be doing it with the jury, so I'll find a courtroom and I'll give the decision at 9 tomorrow morning.

[35] On Tuesday morning, June 1, 1999, the same morning that jury selection began, the judge gave a one minute oral decision which unfortunately was not recorded. She found that both Ms. Hartrick's January 22, 1998 videotaped **KGB** statement to the police and the audiotape of her evidence given at the preliminary inquiry on August 18-19, 1998 were admissible.

[36] Some parts of Ms. Hartrick's evidence were edited out after the judge's oral decision because they were irrelevant. Other portions were edited out because they violated the character rule or were unduly prejudicial. Some portions were permitted as narrative only.

[37] The judge filed her written reasons for her decision on June 14, 2000. This was after the end of the trial, the verdict having been reached September 17, 1999, and after the notice of appeal was filed on October 13, 1999.

[38] The judge stated in her written reasons, the following with respect to her oral decision given on June 1, 1999:

[4] Before the start of the trial, I gave my ruling that it was then the appropriate time to make my decision. I concluded that the testimony from the preliminary hearing did not meet the s. 715 requirements. However, I concluded that it did meet the test of the principled exception to the hearsay rule and it was therefore admitted. I also concluded that the KGB statement of Margaret Elizabeth Hartrick met the test of the principled exception to the hearsay rule and it was therefore admissible, as well.

[5] I now give my detailed reasons.

[39] She stated her reason for not admitting Ms. Hartrick's preliminary inquiry evidence under s.715 of the **Criminal Code of Canada**, R.S.C., 1985 c. C-34:

[19] I conclude that the defence did not have the full opportunity to cross-examine Margaret Hartrick at the preliminary hearing because the defence did not know about her evidence about having psychic visions. The defence did not have an opportunity to cross-examine Margaret Hartrick about these visions. I am therefore satisfied that the defence has met the burden upon it to show that it did not have a full opportunity to cross-examine Margaret Hartrick at the preliminary.

[20] Mr. Murray also raised the issue of Margaret Hartrick's criminal record. Because of my conclusion above, I do not need to deal with that. Nor do I need to deal with the issue of possible inducements.

[40] On appeal Mr. Assoun made four arguments with respect to the admission of Ms. Hartrick's **KGB** statement and preliminary inquiry evidence. (1) He argued the judge erred by failing to edit Ms. Hartrick's **KGB** statement and preliminary inquiry evidence before the commencement of the trial. (2) He argued she erred because her written reasons were filed late. (3) He argued she erred in applying to Ms. Hartrick's evidence, the law of the principled approach to hearsay evidence. (4) Finally, he argued that she erred in admitting both the **KGB** statement and the preliminary inquiry evidence.

(i) failure to edit

[41] In his first argument, Mr. Assoun argued that the judge's failure to edit Ms. Hartrick's **KGB** statement and preliminary inquiry evidence before the trial began, infringed his right to make full answer and defence; particularly that he did not know the case he had to meet without this editing.

[42] The sequence of events with regard to the editing of Ms. Hartrick's **KGB** statement and preliminary inquiry evidence is as follows:

June 1/99	-- Oral decision in <i>voir dire</i>
June 2 and 3	-- Initial trial witnesses -- Mr. Murray still acting as defence counsel
June 4	-- Appellant advised the Court that he wished to represent himself
June 7	-- Mr. Murray formally discharged by Court
June 10	-- Editing process begins
June 30	-- Editing process essentially complete
August 23	-- Trial recommenced

[43] Mr. Assoun did not point to any examples of how the judge's failure to edit Ms. Hartrick's **KGB** statement and preliminary inquiry evidence before the trial began adversely affected the conduct of the defence. The only evidence that could have been affected was that given on June 2 and 3, while Mr. Assoun was still represented by counsel. This was the evidence of Wayne Wise, Corey Tuma, Shirley I. Jordan, Mary F. Jordan, Eric A. Enslev, Constable Randy A. MacDonald, Barbara J. Ernst, Wanda D. Clayton and Constable Leslie G. R. Seebold. No argument was advanced that any of these witnesses could have been cross-examined more effectively if the editing had already been settled. The editing was complete prior to the recommencement of the trial on August 23, the third day of evidence before the jury.

[44] Defence counsel never requested that the judge do this editing or asserted that the defence would be adversely affected by the judge not doing the editing before the trial began. On the contrary, it is clear from the record that it was understood between defence and Crown counsel, and the judge was so advised, that if she admitted Ms. Hartrick's **KGB** statement or preliminary inquiry evidence under the principled approach to hearsay, that counsel would deal with the editing on other grounds at a later time.

[45] In light of the fact that the editing was complete before the third day of evidence before the jury, the absence of any indication of how the lack of editing affected the conduct of the defence during the first two days of trial and the position taken by trial counsel at the *voir dire*, we are satisfied the appellant knew the case he had to meet and was not prejudiced by the fact the judge did not edit Ms. Hartrick's evidence before any evidence was heard by the jury.

(ii) timing of written reasons

[46] Mr. Assoun's second argument on the admissibility of Ms. Hartrick's **KGB** statement and preliminary inquiry evidence was that the judge erred by filing her written reasons after the trial had concluded on September 17, 1999 and after the notice of appeal had been filed on October 13, 1999. He argued her decision to admit this evidence should be treated as one without reasons following **R. v. Sheppard**, [2002] 1 SCR 869. He also argued that her written reasons should be disregarded on the basis that it was inherently wrong and that justice is not seen to be done when written reasons are filed late, in essence arguing her reasons were nothing more than advocacy directed to this court to support her decision.

[47] The appellant has not satisfied us that the principles in **Sheppard** apply. None of the 10 principles set out in ¶ 55 of **Sheppard** is concerned with the timing of a judge's reasons. Rather **Sheppard** addresses the content of the reasons and whether they are sufficient to allow meaningful appellate review.

[48] Nor has Mr. Assoun satisfied us that we should disregard the judge's reasons on the basis they are no more than advocacy to this court.

[49] The court in **R v. Quinn**, (2004) 372 A.R. 223 (Alta.Q.B.) stated:

[10]...there is nothing objectionable to a decision with "reasons to follow", but a trial judge should not try to buttress a decision in the face of an appeal...

[50] The court in the civil case of **Crocker v. Sipus** (1992), 95 D.L.R. (4th) 360 (Ont. C.A.) stated at pp. 362-364:

Careful deliberation, expeditious disposition, and the giving of comprehensive reasons, are often competing goals of justice in busy trial courts. The preparation of reasons, whether to be delivered orally or in writing, is an important part of the deliberation process which leads to the disposition of the issues. The entire process may sometimes be condensed into the delivery of brief reasons immediately after the hearing. Such is not, however, invariably the case. The needs of justice in a given case may be better served by an announcement of the disposition of the matter as soon as the deliberation process is completed but before full written reasons can be made available to the parties. The mere filing of a notice of appeal after the disposition has been announced does not bar the consideration on appeal of the reasons released subsequently. ...

This is not a case in which the actions of the trial judge, in releasing reasons after an appeal has been launched, are subject to the criticism that his reasons are mere advocacy for his earlier endorsement, rather than the genuine product of his findings and reflections as to what the proper disposition of the case should be. The notice of appeal did not alert the judge to any alleged deficiency in his conduct of the trial, to any error in rulings made during the course of the trial, or to any matter which he could possibly attempt to justify in the course of his reasons. This is different than the situation in **Scarr v. Gower** (1956), 2 D.L.R. (2d) 402, 18 W.W.R. 184 (B.C.C.A.), where the reasons were given three days before the hearing of an appeal, at the request of counsel, "to clarify the issue for the purposes of the appeal". It is also different than the facts of **Wm. Unser Ltd. v. Toronto**, [1954] 2 D.L.R. 364, [1954] O.W.N. 263, where this court held that written reasons by the trial judge, which had been prepared by him at the request of counsel after the disposition of the appeal by the court of appeal, should not be included as part of the record in a further appeal to the Supreme Court of Canada. Such circumstances may no doubt create an appearance that the trial judge is explaining -- and thus defending -- himself or herself to the appellate court, rather than merely expressing findings and articulating the reasoning which led to the conclusion. It is this attempt at appellate advocacy by trial judges that the Supreme Court of Canada was denouncing in the early case of **Mayhew v. Stone** (1895), 26 S.C.R. 58, where Taschereau J. said, at p. 61:

It appears that, after the judgments had been delivered in the Court of Appeal in equity, and after notice of this appeal had been given and security thereupon had been allowed, the Chief Justice, who had given the

judgment of the court, filed at the prothonotary's office a document styled "memorandum to be annexed to my judgment in this case, and to be considered in connection therewith." That document is nothing else but an answer to the judgment delivered in open court by the Master of the Rolls who had given a dissenting opinion. To this "memorandum" is attached an opinion of the Vice-Chancellor in the same sense, that is to say in answer also to the Master of the Rolls, though he, the Vice-Chancellor, had in court simply concurred with the Chief Justice without any remarks. Now, that these documents should not have formed part of this appeal book is self-evident. The Master of the Rolls however, who settled the case, not only allowed them to go in, though objected to, but further added to these glaring irregularities by himself putting upon the appeal book as part of the case a document in the shape of a replication to his colleagues' answers to his opinion. So that we have the opinion, the answer to it, and the replication. With all due respect for the learned judges, this last document, as the other ones it purports to answer, cannot be considered by this court as forming part of the case.

The authorities go no further and do not support a blanket prohibition against the release of reasons after an endorsement of the judgment or order, merely because an appeal has been launched. Indeed, if the filing of a notice of appeal was itself sufficient to compel the appellate court to disregard the reasons, the practice, limited as it is, of releasing reasons after the formal endorsement has been announced would be brought to a complete halt since the immediate launching of an appeal would be a virtual guarantee of obtaining a new trial, at least in cases requiring findings of fact. In the present case, a reading of the reasons, released as they were after the filing of a bald notice of appeal, could not support a reasonable apprehension that they were crafted as a brief defending the judgment under attack. The reasons deserved full consideration on appeal.

[51] The record in this case is clear that the judge always intended to provide written reasons. The notice of appeal was filed by Mr. Assoun at a time when he represented himself. The only reference in it to Ms. Hartrick's evidence is an allegation that the judge erred "by admitting a videotaped **KGB** statement when the witness could not be cross-examined by the defence." This general statement did nothing to alert the judge to any particular matter that she could attempt to buttress in her reasons on the *voir dire*.

[52] We are satisfied the judge did not provide her written reasons to buttress her oral decision once she learned an appeal had been launched and that her reasons deserve full consideration on appeal.

(iii) application of principled approach (threshold reliability)

[53] Mr. Assoun's third argument on the admissibility of Ms. Hartrick's **KGB** statement and preliminary inquiry evidence concerned the judge's application to Ms. Hartrick's evidence of the general law of the principled approach to the admission of hearsay evidence. He first argued, with respect to the preliminary inquiry evidence only, that the judge erred in admitting it under the principled approach after having rejected its admission under s.715 of the **Code**. Second, with respect to both the preliminary inquiry evidence and the **KGB** statement, he argued the judge erred in determining they were reliable; that is that there were sufficient circumstantial guarantees of trustworthiness for their admission under the principled approach.

[54] The applicable standard of review when reviewing a judge's admission of hearsay evidence under the principled approach was reviewed in **R. v. P.S.B.**, (2004), 222 N.S.R. (2d) 26 (NSCA):

[37] Appellate review of the admission of these statements must accept the trial judge's findings of fact absent manifest error. However, the correctness standard of review applies to the questions of whether the judge invoked an incorrect legal standard, failed to consider a required element of a legal test or made some other error in principle. In addition, the judge's application of the legal principles to the facts will generally be reviewed for correctness in rulings such as this concerning the admissibility of evidence: **R. v. Merz** (1999), 127 O.A.C. 1; 140 CCC (3d) 259 (Ont.C.A.) at para 49; **R. v. Underwood (G.B.)**, [2002] A.J. No 1558 (CA) at para 60 -63.

[55] Mr. Assoun's first argument, that the judge erred in admitting the preliminary inquiry evidence under the principled approach after having rejected its admission under s.715 of the **Code**, is a question of whether the judge invoked the correct legal standard. The standard of review is correctness. His second argument is a reargument of admissibility. By implication, he is arguing that the judge erred by applying wrong principles of law to the facts. The standard of review again is correctness.

[56] Mr. Assoun has not satisfied us that the judge erred in admitting the preliminary inquiry evidence under the principled approach after finding it was not admissible pursuant to s.715 of the **Code**. In essence his argument was that the

requirement for full cross-examination under s.715 should be imported into the principled approach to hearsay permitted by the common law.

[57] There is no authority for this argument and it is contrary to **R. v. Hawkins**, [1996] 3 S.C.R. 1043:

[57] . . . Accordingly, if preliminary inquiry testimony does not meet the requirements for admissibility under s. 715, it remains open for the trial judge to consider whether such testimony may still be read into evidence by reference to the principles of the common law.

[58] With respect to Mr. Assoun's second argument, the application of the principled approach to the admission of hearsay evidence to Ms. Hartrick's evidence, it should be remembered that the issue at the *voir dire* was threshold reliability, whether the evidence should be considered by the trier of fact, not ultimate reliability, whether the evidence is true or false. Ultimate reliability is for the trier of fact.

[59] Mr. Assoun did not argue that the common law pillar of "necessity" had not been met. He focussed instead on the pillar of "reliability", arguing that since there were not sufficient circumstantial guarantees of trustworthiness to admit Ms. Hartrick's evidence, the judge erred in admitting it.

[60] In **R. v. Smith**, [1992] 2 S.C.R. 915 the court dealt with threshold "reliability" at ¶ 33:

The criterion of "reliability" -- or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness -- is a function of the circumstances under which the statement in question was made. If a statement sought to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. The evidence of the infant complainant in **Khan** was found to be reliable on this basis.

[61] In **R. v. Starr**, [2000] 2 S.C.R. 144 the court referred to factors that are irrelevant to admissibility at ¶ 217:

At the stage of hearsay admissibility the trial judge should not consider the declarant's general reputation for truthfulness, nor any prior or subsequent

statements, consistent or not. These factors do not concern the circumstances of the statement itself. Similarly, I would not consider the presence of corroborating or conflicting evidence. On this point, I agree with the Ontario Court of Appeal's decision in **R. v. C. (B.)** (1993), 12 O.R. (3d) 608; see also **Idaho v. Wright**, 497 U.S. 805 (1990). In summary, under the principled approach a court must not invade the province of the trier of fact and condition admissibility of hearsay on whether the evidence is ultimately reliable. However, it will need to examine whether the circumstances in which the statement was made lend sufficient credibility to allow a finding of threshold reliability.

- [62] In **P.S.B., *supra***, this court reviewed the issue of threshold reliability:

34 Circumstantial guarantees of trustworthiness generally fall into two categories of factors which are not mutually exclusive. The first group of factors are those which tend to show that there is a greater likelihood that the evidence is reliable in the sense that it is true and accurate. The second group consists of factors which tend to enhance the ability of the trier of fact to judge whether the evidence is reliable or not. This Court summed up the effect of a number of the leading cases in **R. v. Wilcox** (2001), 192 N.S.R. (2d) 159; [2001] N.S.J. No. 85 (Q.L.) at para. 66:

[66] Threshold reliability is not directly concerned with whether the contents of the statement are true, but with whether the circumstances surrounding the statement provide circumstantial guarantees of its trustworthiness: see **Starr**, [2000] 2 S.C.R. 144, per Iacobucci J. at p. 534. The question of whether such guarantees are present has two aspects which reflect the underlying rationalia of the hearsay rule and most of its traditional exceptions. The first concerns whether the statement was made in circumstances tending to negate inaccuracy or fabrication. Factors such as the absence of any motive on the part of the declarant to fabricate the evidence are relevant to this inquiry: see e.g. **Starr, *supra***, at [paragraph] 214 - 215. The second aspect of threshold reliability is concerned with whether the statement was made in circumstances which provide the trier of fact with a satisfactory basis for evaluating the truth of the statement: see e.g. **Hawkins, *supra*** at [paragraph] 75. Consideration of threshold reliability requires an examination of the specific hearsay dangers raised by the statement and determination of whether the facts surrounding it "... offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers.": see **Hawkins, *supra*** at [paragraph] 75. The focus, however, remains on circumstances related to the statement itself, not on extraneous matters relevant to ultimate reliability such as whether there is other confirmatory evidence or on the reputation for truthfulness of the declarant.

35 In the first category of circumstances, those tending to negate inaccuracy or fabrication, a number of factors have been identified in the cases. These include the possibility of mistake, the presence or absence of a motive to lie, the mental capacity of the maker of the statement and his or her ability to perceive, recall and recount accurately: see, e.g., **R. v. Parrott**, [2001] 1 S.C.R. 178 at para. 70. Where the declarant is a young child, the need for examination of the child's demeanor, personality, intelligence and understanding has been stressed: **R. v. Khan**, [1990] 2 S.C.R. 531 at 537. At the end of the day, the question is whether the circumstances in which the statement was made compensate for the traditional "dangers" of permitting the trier of fact to consider evidence adduced in the form of hearsay.

36 In the second category of circumstances - those which compensate for loss of the usual ways of evaluating testimony given in court - the cases have also identified a number of factors. If the out-of-court statement was given under oath and/or video-taped, the trier can see the demeanor of the witness while making the statement and the oath replicates the trial condition of sworn evidence. If there is a full record of the statement and evidence relating to the way in which it was elicited and given these factors compensate for the inability of the trier of fact to observe the declarant while testifying. If the declarant testifies at trial, the availability of cross-examination at trial compensates to a degree for the absence of cross-examination at the time the statement was made.

[63] The court in **Hawkins**, *supra*, dealt specifically with the admissibility of preliminary inquiry evidence where the witness was not available at trial:

[79] For these reasons, we find that a witness's recorded testimony before a preliminary inquiry bears sufficient hallmarks of trustworthiness to permit the trier of fact to make substantive use of such statements at trial. The surrounding circumstances of such testimony, particularly the presence of an oath or affirmation and the opportunity for contemporaneous cross-examination, more than adequately compensate for the trier of fact's inability to observe the demeanor of the witness in court. The absence of the witness at trial goes to the weight of such testimony, not to its admissibility.

[64] To support his argument that there were not sufficient circumstantial guarantees of trustworthiness to admit Ms. Hartrick's evidence, Mr. Assoun argued that there was a possibility that Ms. Hartrick had a motive to lie when she gave her statement to the police and that the judge did not give appropriate weight to this possibility. He based this argument on the fact Ms. Hartrick first indicated to the

police that she had some knowledge of Ms. Way's murder when she was questioned by them in November of 1996 in connection with the death of another man who had died of a heart attack.

[65] A review of the record satisfies us there is no merit to this argument. It is based on speculation. The evidence of Constable Anthony Blencowe was that Ms. Hartrick may have been a witness, but was not a suspect, with respect to that man's death by natural causes. Such circumstances would not usually give rise to a motive to lie.

[66] Mr. Assoun also argued the following evidence should have led the judge to conclude that there were not sufficient circumstantial guarantees of trustworthiness to admit her evidence: when Ms. Hartrick spoke to the police in 1996 she lied about the reason she became a prostitute; she indicated to them that some of her information about the murder came to her through "psychic visions"; she had a "chronic drug habit"; she was under the influence of cocaine when she alleged she met Mr. Assoun near the crime scene at 4:15am and he indicated to her that Ms. Way was dead; Ms. Hartrick was a prostitute and the police used inducements to obtain the statement: food, cigarettes and a hotel room to dry out in prior to the preliminary inquiry.

[67] Many of the above factors may be relevant to ultimate reliability but are not relevant to threshold reliability. **Starr**, *supra*, at ¶ 217, **Hawkins**, *supra* at ¶ 81(re inducements).

[68] There were significant circumstantial guarantees of trustworthiness relating to the **KGB** statement. All of the procedural protocols established in **R. v. KGB** (1993), 79 C.C.C. (3d) 257 (S.C.C.) were followed. The form contained the usual warnings and cautions and Ms. Hartrick acknowledged these with her signature. Ms. Hartrick was under oath. Her demeanor can be assessed from the videotape. She was cross-examined on her **KGB** statement by defence counsel at the preliminary inquiry.

[69] In her videotaped **KGB** statement Ms. Hartrick appeared sober, coherent and willingly cooperative. She said she was tired but appeared to be alert and focussed on the two police officers. She appeared to be taking the process seriously and answered questions readily without significant hesitation.

[70] The significant circumstantial guarantees of trustworthiness referred to in **Hawkins, supra**, apply to Ms. Hartrick's preliminary inquiry evidence. She was under oath, there was an audiotape of her evidence and she was cross-examined on everything except her "psychic visions" and her full criminal history relating to prostitution. Furthermore, evidence on both these matters was before the jury in any event.

[71] The pivotal question given that Ms. Hartrick was not available for full cross-examination before the jury, is whether it is likely, had Ms. Hartrick been available, that her evidence could have significantly changed from her **KGB** statement and her preliminary inquiry evidence.

[72] This test was approved in **Smith, supra**. There, the hearsay concerning the third phone call was ruled inadmissible because the court could not say that the evidence could not reasonably have been expected to change significantly at trial if the witness had been available to testify in person and be subject to cross-examination:

[44] . . . I cannot say that this evidence could not reasonably have been expected to have changed significantly had [the declarant] been available to give evidence in person subjected to cross-examination.

[73] See also **R. v Czibulka** (2004), 189 C.C.C. (3d) 199 (Ont. C.A.) at ¶ 26.

[74] We agree with the Crown's submission that cross-examination of Ms. Hartrick at trial concerning her "psychic visions" and full criminal history with respect to prostitution, the only two matters not fully explored on her cross-examination at the preliminary inquiry, would not likely have caused her to change her evidence that she met Mr. Assoun at 4:15 a.m. on the morning of Ms. Way's murder near the crime scene, which was the critical part of her evidence. She was adamant on November 14, 1996 that her account of her meeting with Mr. Assoun was based on fact not on psychic vision. This continued to be her position until she gave her **KGB** statement in 1998. She was cross-examined on her **KGB** statement and her criminal convictions for prostitution at the preliminary inquiry. It is unlikely cross-examination on the additional prostitution charges she faced would have changed her account of her meeting with Mr. Assoun.

[75] Considering the direction in **Starr**, *supra*, of the factors not to be considered when dealing with threshold admissibility, the significant circumstantial guarantees of trustworthiness relating to Ms. Hartrick's **KGB** statement and preliminary inquiry evidence, the almost full cross-examination that took place at the preliminary inquiry, and the unlikeliness that cross-examination of Ms. Hartrick by Mr. Assoun about her psychic visions and criminal record could have changed her critical evidence at trial, we are satisfied the judge did not err in admitting Ms. Hartrick's **KGB** statement and preliminary inquiry evidence under the principled approach to hearsay.

(iv) multiple statements

[76] The appellant has not satisfied us on his final argument with respect to the admission of Ms. Hartrick's **KGB** statement and preliminary inquiry evidence; that the judge erred in admitting both. Multiple statements have been held admissible in appropriate circumstances. In **R v. MacDonald** (2000), 184 N.S.R. (2d) 1 (NSCA) this court held that the admission of a **KGB** statement and the preliminary inquiry evidence was not an error:

84 The so-called **KGB** statement gave the jury an opportunity to observe the demeanor of Nowlan as she testified before the video camera. On the other hand, if only the video were tendered, the jury would not have had the benefit of the extensive cross-examination administered at the preliminary. The preliminary was much more detailed than the **KGB** statement. It was not a mere repetition. Parts of the **KGB** statement were put to Nowlan in the preliminary inquiry by way of cross-examination. Thus, the statement and the preliminary inquiry transcript complement each other. There were some inconsistencies between the statement and the inquiry transcript. Not to put both before the jury would take away a means of assessing credibility and leave them with less than the whole picture. I have concluded that having regard to the principles laid down in **Hawkins**, *supra*, the criteria for admissibility of both the transcript and the video were met. In my view, it was necessary to admit both the preliminary inquiry transcript and the so-called **KGB** statement in fairness to both the accused and the Crown. This was not a case where an additional statement added nothing or was unnecessary for the purpose of completing the account. In **R. v. Meaney** (1996), 111 C.C.C. (3d) 55 (Nfld. C.A.), (application for leave to appeal to the Supreme Court of Canada dismissed, [1996] S.C.C.A. No. 591), O'Neill, J.A., speaking for the court, said at p. 76:

The law is clear that, in order to get a full account of what is alleged to have happened to a particular complainant such as we have here, it may be necessary to take the evidence of more than one person. However, if any additional statements add nothing or are unnecessary for purposes of completing the account, then that evidence should not be admitted ...

85 Here, both the preliminary inquiry transcript and the **KGB** statement were necessary to put a "full and frank account" of Deborah Nowlan's evidence before the jury. See **R. v. Rockey** (1996), 110 C.C.C. (3d) 481 (S.C.C.) at p. 490.

[77] The analysis in **MacDonald**, *supra*, applies here. Ms. Hartrick's **KGB** statement was videotaped, allowing the jury to observe Ms. Hartrick's demeanour while she testified. The preliminary inquiry evidence on the other hand showed Ms. Hartrick under extensive cross-examination. The evidence adduced on cross-examination was more extensive than the testimony in the **KGB** statement with respect to Ms. Hartrick's drug use generally and on the morning of Ms. Way's murder when she met Mr. Assoun. The preliminary inquiry evidence was not a mere repetition of her **KGB** statement. For example, it was only in her preliminary inquiry evidence that Ms. Hartrick testified that she did not see Mr. Assoun coming from behind the building where Ms. Way's body was found and that this area was not an area used by prostitutes in their work. There were also inconsistencies between the two, such as her evidence as to exactly what Mr. Assoun said to her at 4:15 a.m. In her **KGB** statement Ms. Hartrick indicated that Mr. Assoun named Ms. Way as the person who was dead. In her preliminary inquiry testimony she testified Mr. Assoun did not identify Ms. Way by name. Thus the **KGB** statement and the preliminary inquiry evidence complement each other as they did in **MacDonald**, *supra*. Both were required to give the jury the full picture.

b. jury charge

[78] The second issue raised by Mr. Assoun with respect to Ms. Hartrick's evidence was that the judge's charge to the jury was deficient. He argued the judge erred by (1) not adequately reviewing with the jury Ms. Hartrick's evidence; (2) by not giving the jury an adequate special caution with respect to the fact her evidence was hearsay; and (3) by not properly conveying to the jury the position of the defence.

[79] When reviewing a jury charge, we must remember that the correctness standard of review applies to the question of whether the judge invoked an incorrect

legal standard, failed to consider a required element of a legal test or made some other error in principal: *R. v. P.S.B.*, *supra*, at ¶ 37.

[80] As stated by the court in **R. v. Malott**, [1998] 1 S.C.R. 123, perfection is not required in a charge to the jury with respect to the review of the evidence and the review of the defence position.

14. A jury charge should provide the jurors with an understanding of their role as triers of fact and the essence of the case before them. See **Azoulay v. The Queen**, [1952] 2 S.C.R. 495, *per* Taschereau J. at pp. 497-98:

The rule which has been laid down, and consistently followed is that in a jury trial the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

15. Canadian jurisprudence is plain that a standard of perfection is not the test when an appellate court reviews a jury charge. **R. v. Jacquard**, [1997] 1 S.C.R. 314, confirmed that while accused persons are entitled to properly instructed juries, there is no requirement that a jury be perfectly instructed. A standard of perfection would be unattainable in most cases. Some have described a jury charge as an art rather than a science.

16. In assessing whether a charge to the jury was proper, it is the charge as a whole that must be examined for error: see **R. v. Evans**, [1993] 2 S.C.R. 629. Also **Jacquard**, *per* Lamer C.J. speaking for the majority at p. 326:

In many cases, a trial judge need only review relevant evidence once and has no duty to review the evidence in a case in relation to every essential issue. See **John v. The Queen**, [1971] S.C.R. 781, **Cluett v. The Queen**, [1985] 2 S.C.R. 216. As long as an appellate court, when looking at the trial judge's charge to the jury as a whole, concludes that the jury was left with a sufficient understanding of the facts as they relate to the relevant issues, the charge is proper.

(i) adequacy of review of Ms. Hartrick's evidence

[81] In his first argument dealing with the jury charge, that the judge erred by not adequately reviewing Ms. Hartrick's evidence in her charge, Mr. Assoun argued

that the judge did not refer to the fact Ms. Hartrick first informed the police of her knowledge of Ms. Way's murder when she was being questioned about another man's death over a year after Ms. Way's death; that no further investigative steps were taken from the time Ms. Hartrick first gave her statement to the police on November 14, 1996 until January 21, 1998; that he was arrested less than three months after Ms. Hartrick gave her **KGB** statement on January 21, 1998; that Ms. Hartrick lied to the police about the reason she became a prostitute; that Ms. Hartrick talked to the police about her psychic visions on November 14, 1996 and it was only when she was about to be escorted out of the police station that she stated: "Well, I guess it doesn't matter that at 4:15 Glen [Assoun] told me in front of Linda Grandy's apartment that he knew Brenda was dead."; that Ms. Hartrick was smoking crack at the time she allegedly met Mr Assoun; that the police gave her food and money for cigarettes after the first attempt to tape the **KGB** statement failed; that the police felt they could not take a **KGB** statement from Ms. Hartrick in 1996 because she was in no shape to provide such a statement because she was prostituting and using drugs and that Ms. Hartrick had spent time prior to the preliminary inquiry in a hotel at police expense to ensure she had the opportunity to dry out.

[82] A review of the charge satisfies us that it contained the essential aspects of the evidence relating to Ms. Hartrick. For example, the judge's review of the police officer's evidence highlighted the concerns regarding psychic visions, drug use and inducements, the main areas of concern:

In this regard, you will also regard the evidence of the police officers who interviewed [Margaret Hartrick]. Constable Blencowe and Constable Gallant of the Halifax Regional Police, formerly with the Dartmouth Police Service, took her original written statement on November 14th of 1996. They testified that first she talked to them about psychic visions, and then just before they concluded the interview she told them about having seen Glen Assoun on the morning of Brenda Way's murder. Constable Blencowe said he satisfied himself that this was not a statement about a psychic vision but a factual statement. He also testified that because she was a known drug user that they took precautions to check her out. He said she was more coherent than usual. He said, based upon his experience with signs of drug and alcohol use, she was "stone sober." He said too that they made no promises or threats or offered any inducements to her. On cross-examination he admitted he is not a drug expert, although he said he has had some training.

Constable Peter Gallant testified as well about the taking of the November 14th, 1996, statement read by Margaret Hartrick during the video tape statement. He said that during a 45-minute interview she said vague things and said she had psychic premonitions. He testified that in his experience of people on alcohol and drugs that Margaret Elizabeth Hartrick was clean and sober when she gave the statement. He too testified that no promises or threats were made. On cross-examination he said there were two ways Margaret Elizabeth Hartrick talked to them and she said the information about Glen Assoun on November 12th, 1995, was not from a psychic vision. He agreed that since the interview was one year after the murder she had had time to fabricate her evidence.

Constable Derek Williams and Constable Stephen Maxwell testified about the taking of the video tape statement on January 22nd, 1998, and about a failed video-taping on January 21st, 1998.[The video taping equipment malfunctioned on January 21, 1998.] Constable Williams testified about the characteristics of persons on alcohol and drugs. He said that Margaret Elizabeth Hartrick was cold sober, otherwise he said they would not have taken the statement. He said they made no threats or promises and offered no favours. He did say that after the first interview on January 21st, 1998, they bought her some fast food because she said she had not eaten for three days. He said they also gave her money for cigarettes. He said she was also sober and there was no evidence of drugs when the video-taped statement was taken. He said her memory seemed very sharp and she did not deviate from one part of her narrative to another. He said her mind was not wandering and she made no changes from her previous statement of November 1996. On cross-examination he was asked to define "inducement," and asked about them having bought her chicken and cigarettes. He said on cross-examination he is not a trained drug expert, although he has taken some courses in that field. He admitted he had not met Brenda Way before and could not compare her facial features to previous occasions. He also said he did not know the effect of crack on a person who is immune to it.

Constable Stephen Maxwell testified about the same two interviews. He said he had been warned to be sure Margaret Elizabeth Hartrick was straight because of her known drug and alcohol problems. He said he found her straight, coherent, and found no signs of alcohol on her breath. He testified she seemed normal to him but acknowledged it was the first time he had met her. He said he found no signs of drug or alcohol use. He said she first referred to her previous statement from November of 1996 without having read it and said he was quite surprised with how good her memory was of it. He too testified about buying chicken and cigarettes at the end of the interview as they drove her to the Jackson Road area. He said on the date the video-taped statement was done he had no problem with her, and saw no signs of alcohol or drug use. He said at that time no inducements or threats were made. On cross-examination, he admitted that drugs do not affect

all people in the same way, and said that some people on crack lose their appetites and others become very hungry. He also said he did not notice whether Margaret Elizabeth Hartrick had a runny nose during the video-taped statement and said he did not know if that was a symptom of someone sniffing coke.

[83] The charge also included a reference to the fact there was no evidence confirming the meeting Ms. Hartrick said she had with Mr. Assoun at 4:15 the morning of Ms. Way's murder and that there was alibi evidence of Isabel Morse contradicting it:

With respect to the admission allegedly made by Glen Assoun to Margaret Elizabeth "Robin" Hartrick, that he knew Brenda Way was gone at 4:15 a.m. on November 12, 1995, there is no evidence to confirm the admission. There is contradictory evidence of Isabel Morse.

[84] The charge also contained a specific discussion of Ms. Hartrick's evidence, including the contents of the **KGB** statement and her evidence at the preliminary inquiry:

The evidence of Margaret Elizabeth Hartrick, Robin Hartrick, for the preliminary, was played on audio tape and her video-taped statement to the police was played. I have already referred to the evidence of the four police officers who interviewed her; two in November of 1996, and two in January of 1998. In both statements Robin Hartrick said that she had met Glen Assoun outside 109 Albro Lake Road, at 4:15 a.m. on November 12th, 1995. She said he was acting very strange and told her that Brenda was gone. She said they were close to the Capitol Store but on the other side of the street. She said Glen Assoun was very shaky, not himself, like he was doing drugs, which she said he did not. She said she was scared and left. She said she knew the time because she asked Glen Assoun the time and had to hold his arm to see his watch because he was shaking so badly. She testified that she saw him when she left 109 Albro Lake Road, where she had been using crack at Linda Grady's apartment. She said it had no effect on her memory. She also said she visited Mickey Bates before she left that building. She admitted, on cross-examination by Mr. Murray, then Glen Assoun's counsel, at the preliminary, that Glen Assoun also said, "If I find the bitch or prick who did it, they are dead."

[85] There was reference in the charge to Ms. Hartrick's evidence about the relationship between Ms. Way and Mr. Assoun:

Robin Hartrick described the relationship between Glen Assoun and Brenda Way as one in which they loved each other but it was a very jealous relationship. She

said Glen Assoun followed Brenda around and that he was always looking for her. She said Glen was so obsessed with her that Brenda was scared of him. She also said Glen Assoun was against Brenda doing drugs and prostitution. She said they were always arguing.

[86] In addition to reviewing Ms. Hartrick's evidence, the charge outlined the essential elements relating to Mr. Assoun's alibi evidence and other defence evidence and the defence position.

[87] A judge is not required to review all of the evidence. The jury was specifically instructed that the judge would refer to some of the evidence but it was their recollection of the evidence that was important and should be relied on.

I will be dealing with some of the evidence to assist you in coming to a proper conclusion. I may express an opinion on the evidence, but you are not bound to follow my opinion nor my recollection of testimony and, in fact, you must not do so unless that opinion or that statement agrees with your own judgment or recollection. I will review some of the evidence and try to relate it to the law. It does not follow that the evidence to which I refer is the most important evidence. It is for you to say which evidence is most important and weighty.

[88] The jury was also instructed to consider all of the evidence.

You must consider the evidence as a whole and determine whether the guilt of the accused is established by the Crown beyond a reasonable doubt.

[89] It is true that the judge did not refer in her charge to: (1) the criminal record of Ms. Hartrick; (2) Ms. Grandy's evidence that she no longer lived near the crime scene at the time of Ms. Way's murder as Ms. Hartrick had suggested; or (3) Mr. Bate's denial that he was at Ms. Grandy's apartment the night of the murder as indicated by Ms. Hartrick.

[90] With respect to the judge's failure to refer to Ms. Hartrick's criminal history, the jury could not have lost sight of the fact Ms. Hartrick was a prostitute. Further, prostitution is not a crime of dishonesty and would not be expected to be an important factor in evaluating credibility or reliability. Concerning the evidence of Ms. Grandy and Mr. Bates, nondirection on minor pieces of evidence such as these does not result in a reviewable error.

[91] We agree with the Crown's submission that the charge may have been marginally improved by reference to this evidence. However we are not satisfied the judge committed reviewable error in not referring to this evidence or to the additional evidence relating to Ms. Hartrick that is referred to in ¶ 81 above .

(ii) inadequacy of hearsay caution

[92] Mr. Assoun's second argument with respect to the jury charge relating to Ms. Hartrick's evidence was that the judge did not properly caution the jury on the approach it should take in assessing her hearsay evidence.

[93] The judge charged the jury on the hearsay nature of Ms. Hartrick's evidence:

In this trial you have heard an audio tape of the testimony of Margaret Elizabeth Hartrick, also known as Robin. It was a tape of a testimony she gave at the preliminary inquiry in this matter. You also saw and heard her video-taped statement given to the police. This evidence was admitted under a special exception to the hearsay rule. As you have heard me explain during this trial, usually the only admissible evidence is that which comes from a witness, from a person who testifies before you and who can be cross-examined in front of the jury. In this case, Robin Hartrick gave these sworn statements before trial but was not able to attend court because she has since died. Because this evidence is admitted under an exception to the hearsay rule, I must give you a special warning about how you are to deal with it.

Robin Hartrick did not testify in this courtroom and Glen Assoun did not have an opportunity to cross-examine her. Nor, did you have an opportunity to observe her demeanour. However, she was cross-examined by counsel for Mr. Assoun at the preliminary inquiry, and you could observe her on the video tape. It is up to you to decide how much weight you should give to this evidence in light of these circumstances. You should not place the statements of Robin Hartrick on the same footing as the statement of a witness who testifies under oath in this courtroom. You should treat her statements with care and give them the weight you think they deserve.

[94] We are satisfied this was sufficient to bring home to the jury the caution they should exercise in considering Ms. Hartrick's hearsay evidence. It did not caution the jury about the dangers of accepting statements not made under oath and without the jury being able to assess demeanour first hand but these factors were not relevant to the nature of the case before the jury. Both the **KGB** statement and the

preliminary inquiry evidence of Ms. Hartrick were given under oath. The video and audio tapes provided some indication of demeanour. There had been cross-examination at the preliminary inquiry, but no cross-examination before the jury. The jury was warned of this; "Robin Hartrick did not testify in this courtroom and Glen Assoun did not have an opportunity to cross-examine her." The judge tailored her charge to address the issues in dispute at trial and did not err in doing so.

(iii) review of defence position

[95] The appellant's final argument about the jury charge with respect to Ms. Hartrick's evidence was that the judge erred in not properly conveying to the jury the position of the defence.

[96] The judge did not mention Ms. Hartrick's evidence when she reviewed the position of the defence, but she had done so earlier in her charge. She had also previously reviewed the main position of the defence, that of alibi. It would have been clear to the jury that the issue before it was the identification of Ms. Way's assailant. It would also have been clear to it that Mr. Assoun's main defence was alibi, that he was not present at the crime scene because he was with Isabel Morse, and that this meant that he disagreed with the evidence that put him there, Ms. Hartrick's.

[97] The judge did not commit reviewable error in the way she dealt with the defence position in her charge.

[98] In conclusion, on the appellant's arguments with respect to the admissibility of Ms. Hartrick's evidence and the adequacy of the jury charge with respect to it, Mr. Assoun has failed to satisfy us that the judge erred. These grounds of appeal are dismissed.

## **2. Statements of Brenda Way**

[99] Mr. Assoun generally raised two issues with respect to statements which witnesses alleged were made by Ms. Way prior to her death. He argued that the judge erred in admitting these statements and that the judge's charge to the jury with respect to them was deficient.

- a. admission of statements allegedly made by Ms. Way prior to her death

[100] On Monday, May 31, 1999, the day the judge told the parties she would have to delay giving her decision on Ms. Hartrick's *voir dire* until the next day, another *voir dire* began. Mr. Assoun was still represented by counsel.

[101] The purpose of this *voir dire* was to determine the admissibility, and the purpose of the admissibility, of the evidence of a number of people, which evidence essentially related to the nature and quality of the relationship between Mr. Assoun and Ms. Way in the several months preceding Ms. Way's murder. This was relevant to state of mind, motive and thus identity, the main issue at trial.

[102] Much of the evidence given at this *voir dire* was not of a hearsay nature and was included to determine its permitted purpose. For example: there was evidence based on direct observation from Ms. Downey and Ms. Clayton that Mr. Assoun and Ms. Way were arguing; Mr. O'Neill, Ms. Downey, Mr. Corbin, Ms. Beals and Mr. David Way observed bruises on Ms. Way at various times; Mr. Assoun admitted to Mr. Corbin and Ms. Valade that he had assaulted Ms. Way; Ms. Beals and Ms. Valade observed Mr. Assoun assault Ms. Way; Mr. Assoun told Ms. Valade he wanted to get rid of Ms. Way; Mr. Assoun acted in a manner that permitted an inference of jealousy and he was in the habit of possessing and interested in acquiring weapons.

[103] Other evidence given at this *voir dire* related to witnesses reports of statements made by Ms. Way prior to her death. For example, Ms. Way reported to Ms. Beals, Mr. David Way, Mr. Manning, Ms. O'Neil, Ms. Downey and Mr. Corbin that she was afraid of Mr. Assoun; Ms. Way gave a statement to Constable Johnston concerning one assault by Mr. Assoun and told Ms. Beals, Mr. David Way and Ms. Downey of the pending charge and Ms. Way told Ms. Valade and Ms. Beals that she couldn't take the beatings anymore and was hiding from Mr. Assoun.

[104] In her *voir dire* decision the judge used colour coding to group items of evidence as hearsay and non-hearsay. She then subdivided those two groups as to whether the evidence was admissible for its truth and/or as probative of a category referred to as malice, motive, state of mind. She admitted some evidence simply as narrative. Some she found to be inadmissible under her residual discretion on the basis its prejudice outweighed its probative value.

[105] Mr. Assoun made three arguments with respect to the admissibility of Ms. Way's statements. (1) He argued the judge erred by admitting too many of Ms. Way's statements because the volume of repetitive or redundant evidence gave rise to prejudice. (2) He argued the judge erred in admitting, under the principled approach to hearsay, the evidence of Ms. Downey and Constable Johnston with respect to statements made by Ms. Way. (3) Finally, he argued the judge erred by not undertaking a principled analysis concerning the reliability and necessity of each hearsay statement of Ms. Way.

(i) sheer volume, redundancy and repetition

[106] The appellant relied on **R v. Parsons**, (1996) 146 Nfld. & P.E.I.R. 210 to support his argument that the judge erred by admitting too many of Ms. Way's alleged statements:

[41] Without taking any specific position with respect to any one of the out-of-court statements made by the deceased and whether it would meet the requirement of necessity, I have no hesitation in concluding that the acceptance of all the statements by the trial judge resulted in a serious redundancy of evidence because of the extensive repetition and the absence of any further details which might be necessary for a full and complete account of what the deceased might have said or done.

[107] In **Parsons, supra**, the Crown adduced evidence of the victim's statements from 25 witnesses. That distinguishes it from this case where there were far fewer witnesses, under 10. Another distinction between this case and **Parsons, supra**, is that in **Parsons, supra**, the witnesses' statements were repetitive and did not provide additional details which could provide a full account of what the victim did or said. In the case before us, the statements admitted provided evidence of more than Ms. Way's assault by Mr. Assoun and her fear of him. They related Ms. Way's efforts to end her relationship with Mr. Assoun, to have the appellant charged with assault and to hide from him. They pointed to an abusive relationship coming to a difficult end. This evidence, when combined with other evidence, was highly probative of motive, which is relevant to the identity of the assailant, the key issue before the jury.

[108] Neither Crown nor defence counsel at trial raised the issue of repetitiveness with the judge. The judge's decision makes it clear she was aware of her residual discretion to rule evidence inadmissible if, on analysis, she determined it was more

prejudicial than probative, because she excluded five items of evidence on that basis.

[109] Given the number of statements in the case, the variety of issues they addressed and the fact trial counsel did not raise this issue, Mr. Assoun has not satisfied us that the judge erred by admitting too many of Ms. Way's statements.

(ii) Downey/ Johnston evidence

[110] The appellant's second argument was that the judge erred in admitting, under the principled approach to hearsay, the alleged statements attributed to Ms. Way by Ms. Downey and Constable Johnston, with respect to Mr. Assoun assaulting her. The Crown agreed.

[111] The trial judge admitted Ms. Downey's evidence, that Ms. Way attributed a bruise on her body to the appellant's assault, and Constable Johnston's evidence, that Ms. Way laid a complaint of assault against Mr. Assoun, including her written statement, only because there was corroboration:

With respect to the items that were colour coded green, which are really the items dealing with the principled exception to the hearsay rule, those would not, on their own, have the circumstantial guarantee of trustworthiness required to allow them to be admissible. However, each of the two - and there were only two that were marked in green - each is corroborated in circumstances where the accused, Glen Assoun, was present or in the words of Glen Assoun.

Referring to the first, Jane Downey described a bruise. That same description of the bruise is given by Ron Corbin in his testimony. Jane Downey can place the time and date quite exactly. Mr. Corbin, in his testimony, believes it was around the end of September because he said they were getting ready to move out west, but I note that he did see Brenda quite a bit around that time in August, September, and October, he testified.

I also note that a very bad bruise such as the one that was described by Jane Downey could well still have been in evidence at a later date when Ron Corbin saw it. So I am not as concerned about the timing difference in the testimony of Jane Downey and Ron Corbin as I otherwise would be. Therefore, I will allow the evidence of Jane Downey with respect to the bruise on Brenda Way's leg to go in. The second was the testimony of Cst. Johnston and the statement arising out of his investigation on October 7th of 1995. Cst. Johnston took a statement from

Brenda Way of an assault on October 7th, 1995. That assault is corroborated through the testimony of Cathy Valade in her telephone conversation with Glen Assoun that day in which he admitted that he had hit Brenda Way.

So the evidence of Cst. Johnston and the statement of Brenda Way taken at that time are admissible under the principled exception to the hearsay rule because of the additional guarantee of trustworthiness provided by the corroboration in the presence of, or in the words of, the accused himself.

[112] It is clear from her decision that in the absence of corroboration, the judge's ruling would have been that the evidence of Ms. Downey and Constable Johnston lacked the requisite circumstantial guarantees of trustworthiness required for admissibility under the principled approach.

[113] We are satisfied the judge erred in admitting this evidence by relying on corroboration. It should be noted that at the time of her decision the law was not as clear as it is today that corroboration is irrelevant to the threshold reliability analysis in the principled approach to the admission of hearsay evidence. **Starr**, ¶ 217.

[114] Mr. Assoun argued that this error mandated a new trial. The Crown argued that the curative provision under s. 686(1)(b) (iii) of the **Code** should be applied because even without the evidence of Ms. Downey and Constable Johnston, the verdict would inevitably have been the same.

[115] We agree with the Crown that the curative provision should be applied because the verdict would inevitably have been the same without this evidence of Ms. Downey and Constable Johnston. There was non-hearsay evidence admissible to establish assaultive conduct; for example, the appellant's admission to Cathy Valade. Further, assaultive conduct was only one aspect of a much larger body of compelling evidence, some examples of which are referred to in ¶ 103 above, which was admitted to establish, among other things, the appellant's animus to Ms. Way.

### (iii) principled analysis of Ms. Way's statements on individual basis

[116] Mr. Assoun's third argument with respect to the admission of Ms. Way's statements relates only to her hearsay statements. Some of her statements were not hearsay because they were not explicit statements of her state of mind, but rather were statements that permitted an inference as to her state of mind. Statements

permitting an inference of state of mind are recognized as original testimonial evidence and are admitted as circumstantial evidence from which a state of mind can be inferred and are not subject to the principled approach analysis. **R. v. R.P.** (1990), 58 C.C.C. (3d) 334 (Ont. H.C.).

[117] The Crown first raised this point, suggesting it was arguable, considering the combined principles in **RP**, *supra*, and **Starr**, *supra*, that an individual analysis was required.

[118] Mr. Assoun argued that the judge erred by not undertaking a principled analysis concerning the reliability and necessity of each statement of Ms. Way. He argued that if she had undertaken this analysis, she would not have admitted these statements because they did not meet the test of having circumstantial guarantees of trustworthiness as required for the principled approach to the admission of hearsay evidence. He argued this court should undertake this analysis and after finding the statements not admissible, should order a new trial.

[119] The Crown's position was that if the judge erred by not analysing each statement of Ms. Way individually, that the curative provision, s. 686(1)(b)(iii), of the **Code** should be applied. It argued the general admission of these statements did not result in a substantial wrong or a miscarriage of justice within the meaning of s. 686(1)(b)(iii) and that there was no possibility that the verdict would have been different had the error not been made because Ms. Way's individual statements were admissible under the principled analysis when analysed on an individual basis. In the alternative, the Crown argued that even if Ms. Way's hearsay statements were wrongly admitted, the verdict would inevitably have been the same.

[120] We will not review again the law with respect to the principled approach to the admission of hearsay evidence, which has already been reviewed in ¶ 60 to 63 above, with respect to Ms. Hartrick's evidence.

[121] The appellant did not attempt to analyse the specific circumstances under which each statement of Ms. Way was obtained. Instead, he generally argued with respect to all of the statements, that Ms. Way had a "motive to lie" and that there were "circumstances of suspicion" surrounding the making of all of Ms. Way's hearsay statements, so that they were unreliable for the purpose of admission under the principled approach.

[122] The context in which Ms. Way's statements were made is important to remember. They were made in the context of a difficult and deteriorating domestic relationship. The statements were made to family, friends and acquaintances. Statements of this nature are never made under oath or subject to cross-examination and yet they are usually and properly admitted into evidence at trial in domestic homicide cases.

[123] We accept the Crown's submission that in this context the correct analytic framework within which to determine the admissibility of Ms. Way's individual statements was set out in **R v. Czibulka**, at ¶ 26:

Since the declarant was not available in this case, threshold reliability turned on the **Smith, Khan** and **Starr** line of cases. Admissibility depends on the judge being satisfied that the circumstances under which the letter was written "negate or at least ameliorate the dangers inherent in hearsay evidence." See **R. v. Kimberly** (2001), 157 CCC (3d) 129 (Ont. C.A.) at p. 151. If the court cannot say that the contents of the hearsay statement "could not reasonably have been expected to have changed significantly had [the deceased] been available to give evidence in person and subjected to cross-examination", threshold reliability has not been made out: **Smith** at p 273.

[124] Mr. Assoun argued that Ms. Way's motive to lie was either to paint herself as the aggrieved party to obtain sympathy or to paint Mr. Assoun in a bad light.

[125] There is nothing in the record to support this argument. Ms. Way had nothing to gain by painting herself as the aggrieved party and Mr. Assoun as the grievor. There is no suggestion in the evidence that she received any kind of benefit from her alleged statements. The more likely motivation of Ms. Way was that she was in a deteriorating relationship with Mr. Assoun and that her statements were motivated by fear. Such motivation would not preclude the admission of Ms. Way's statements.

[126] Mr. Assoun's second argument was that Ms. Way's statements should not have been admitted because they were made under "circumstances of suspicion", specifically the fact that Ms. Way was a prostitute, was addicted to crack cocaine and the nature of her relationship with Mr. Assoun.

[127] Ms. Way's addiction to crack cocaine would not be relevant to threshold reliability unless there was evidence that she was under the influence of drugs when

she made any particular statement. There is no such evidence. Nor is the fact she was a prostitute relevant to threshold reliability. Matters of general reputation are not factors to be considered on *voir dire*. Therefore these factors would not have precluded the admission of Ms. Way's statements.

[128] The appellant has not satisfied us that the individual statements of Ms. Way would not have been admitted if the judge had considered them individually. To the contrary, we are satisfied there is no reason they would not have been admitted. That being the case, the curative provision should be applied because the error, if there was one, did not result in a substantial wrong or miscarriage of justice and there was no possibility that the verdict would have been different had the statements been assessed for admissibility individually.

[129] At this point we want to be clear that given our conclusion that the curative provision would apply if an error was made, we have assumed without deciding, that the combined principles of **RP**, *supra*, and **Starr**, *supra*, required the judge to individually analyse each of Ms. Way's statements to see if it was admissible under the principled approach to hearsay.

[130] Furthermore, the Crown has satisfied us that, even if Ms. Way's statements were admitted in error, the verdict would not have been different. The Crown dealt with this issue in its factum:

33. Finally, in the event that any of the deceased's statements should not have been in evidence, it is submitted that the verdict would have been the same absent this evidence.

34. It is remarkable to now suggest that the deteriorating relationship between the Appellant and Brenda Way was a matter that could have been a live issue at trial but for the evidence of Way's statements.

35. There are two reasons for this position.

36. First, Brenda Way's statements constituted only part of a larger body of admissible evidence that pointed solely to a badly deteriorating personal relationship.

37. Secondly, it was never the position of the defence that the relationship was of a quality different from the picture that emerged from the hearsay and

non-hearsay evidence. In some cases, the defence argues a reasonable doubt arising from contradictory evidence concerning motive. This is not such a case. The defence offered no evidence disputing the existence of the motive. Rather, the defence argued that the Appellant did not act on the motive. The fact that the jury requested to rehear the evidence of Hartrick and M.G. during its deliberations reflects that it was deliberating on a correct course. With respect, the defence position on appeal is an artificial and contrived attempt to recharacterize the essential issue in the case and hence to overturn the verdict by a sideward.

[131] We agree.

b. jury charge

[132] The appellant's second issue with respect to Ms. Way's statements was that the judge erred in her instructions to the jury as to the use it could make of these statements. He argued the judge erred because the charge did not remind the jury that these statements were not under oath, that they did not have the opportunity to observe the demeanour of Ms. Way and that the statements were not subject to cross-examination so that this evidence was not on the same footing as the evidence of witnesses who testified before them and should be examined carefully. He argued the judge should have told the jurors to consider the reliability of the witnesses who related Ms. Way's statements, told them not to use this evidence for propensity and told them to go on to consider whether Ms. Way was being truthful when she made the statements.

[133] Ms. Way's statements were before the jury as probative of state of mind, not for the purpose of establishing prior discreditable conduct or bad character of Mr. Assoun (for example, an assault). There was other evidence before the jury to establish state of mind. Ms. Way's state of mind and the appellant's state of mind are probative of the relationship between them at the time of Ms. Way's murder. Therefore, they are probative of motive, which is relevant to identity.

[134] For evidence of this nature, the two essential matters that the judge was required to charge the jury on are its prohibited use, that it cannot be used as evidence of Mr. Assoun's propensity to commit the crime of which he was accused, and its limited purpose, to establish state of mind, which is relevant to motive and identification.

[135] The court in **R. v. M.R.** (2005), 195 C.C.C. (3d) 26 (Ont. C.A.), set out the nature of the charge to be given to a jury concerning the prohibited use of such evidence:

[64] Trial judges have an obligation to instruct juries properly on the use of prior discreditable conduct evidence. This court has held that where such a limiting instruction is required, it is preferable for trial judges to direct the jury that it may not use evidence of prior disreputable conduct to reason from general disposition or character to guilt. In other words, the jury may not rely on such evidence to reason that because an accused is a person of general bad character, he or she is more likely to be guilty of the offence charged. In addition, the jury may not use such evidence to punish the accused for past misconduct by finding the accused guilty of the offence charged: see **R. v. B.(C.)** (2003), 171 C.C.C. (3d) 159 (Ont. C.A.) at paras. 34 and 35.

[136] In this case the judge instructed the jury not to use the evidence of state of mind for the prohibited purpose:

... you should not infer from evidence of character or disposition that Glen Assoun was a person likely to have committed the offence of second-degree murder.

[137] The judge did not instruct the jury that it must not convict Mr. Assoun to punish him for any prior bad act. We are satisfied there was no realistic possibility that the jury would have convicted the appellant for murder to punish him for a prior assault on Ms. Way.

[138] With respect to the permitted use that the jury could make of the state of mind evidence, the charge did not deal with Ms. Way's statements separately. This evidence was included in the judge's instruction on the use the jury could make of other evidence of the relationship between Ms. Way and Mr. Assoun.

[139] The judge did not instruct the jury to use Ms. Way's statements for a prohibited use. After outlining the concept of motive as compared to intention, the judge stated the position of the Crown and defence on motive:

As I understand the positions of the Crown and the defence on this issue, they are as follows.

The Crown contends that Glen Assoun had a motive to commit the offence of second-degree murder of Brenda Way: because he was jealous; to prevent her

from testifying in assault charges that she had laid against him; because Brenda Way had something on him which would put him away for a long time; because she had taken something of his, which was referred to in their argument in front of Cathy Valade at My Son's Place; because he was upset with her over her breaking up with him.

Mr. Assoun did not address the issue of motive except to ascertain from some of the witnesses that they had never seen him hit Brenda Way or threaten her. From this I conclude that his position is that there was no such motive.

[140] The charge continued:

During the course of the trial, the Crown introduced evidence of certain acts or activities of Glen Assoun, either as evidence to help prove motive, malice or state of mind of Glen Assoun, or as a part of a witness's narrative. This evidence also has some bearing on the character and disposition of Glen Assoun. Insofar as it relates to character and disposition, you should disregard the evidence of these acts or this activity. More specifically, you should not infer from evidence of character or disposition that Glen Assoun was a person likely to have committed the offence of second-degree murder.

The evidence to which I have referred was admissible not as evidence of Glen Assoun's character or disposition but for one or more of the following purposes: to show motive by Glen Assoun to kill Brenda Way; to show malice by Glen Assoun towards Brenda Way; to show Glen Assoun's state of mind with respect to Brenda Way; as part of the context in which other events occurred.

[141] Mr. Assoun has not satisfied us that the judge erred by not properly directing the jury on the prohibited and the proper use of Ms. Way's statements.

[142] In conclusion, on the appellant's arguments with respect to the admissibility of Ms. Way's statements and the adequacy of the jury charge with respect to them, Mr. Assoun has failed to satisfy us that a new trial should be ordered where errors were made. Rather, we are satisfied the curative provision should be applied. The grounds of appeal with respect to Ms. Way's statements are dismissed.

### **3. Vetrovec Warnings**

[143] The appellant submits that the trial judge erred in failing to give **Vetrovec** warnings to the jury in relation to the evidence of David Carvery, Wayne Wise and Margaret Hartrick.

[144] In **R. v. Vetrovec**, [1982] 1 S.C.R. 811, the Supreme Court held that, where a witness of disreputable character gives evidence that "occupies a central position in the purported determination of guilt", the trial judge may give a clear and sharp warning to the jury concerning the danger of accepting the evidence in the absence of confirmatory evidence. The court concluded that it was for the trial judge to decide in each case, in his or her discretion, whether to give a warning. Recently in **R. v. T.L.**, 2003 NSCA 44; [2003] N.S.J. No. 136 (Q.L.) Hamilton, J. A. concisely summarized the current and relevant case law respecting **Vetrovec** warnings as follows:

[21] I accept the respondent's summary of the basic legal points relevant to this ground of appeal:

\* The purpose of the warning is to guard against the risk of a conviction based on unreliable evidence by encouraging the jury to look for other evidence which supports that of the witness (**R. v. MacDonald**, [2000] N.S.J. No. 143 (N.S.C.A) at ¶ 161; **R. v. Campbell**, [2002] N.S.J. No. 120 (N.S.C.A.) at ¶ 16).

\* Whether to give the warning is a matter within the discretion of the learned trial Judge, but some exceptional cases require a warning, which, if not given, reflects an error of law (**MacDonald** ¶ 140). There is reversible error only if the warning was essential to a fair trial (**Campbell**, ¶ 27; see also, **Glasgow**, *supra*, ¶ 12, at page 4).

\* The two principal relevant factors in exercising the judicial discretion are the credibility of the witness and the importance of the testimony (**MacDonald** at ¶ 154; **Campbell** at ¶ 9).

\* The failure to give the warning where required may in appropriate cases be cured under s. 686(1)(b)(iii) (**Campbell** at ¶ 9).

\* Curial review must usually accord great deference to the decision of the trial Judge (**MacDonald** at ¶ 160).

[22] Given the parties' agreement that Ms. P.D.'s testimony was central to the appellant's trial, given Ms. P.D.'s admission that she lied under oath, and putting

deference aside since the trial judge does not appear to have considered whether to give a **Vetrovec** warning, what is important in this appeal is to determine if the appellant's entitlement to a fair trial has been jeopardized by the trial judge's failure to give such a warning. This requires a common sense evaluation of the facts of this particular case. From a review of the authorities I conclude that the fact Ms. P.D. admitted that she lied under oath in another case, does not mean it is mandatory that the warning be given.

[23] The case law identifies a pattern of factors frequently present in cases where a **Vetrovec** warning concerning a witness's credibility is required. The exercise of judicial discretion in this matter usually does not depend on a single factor.

[24] For example, in **R. v. Bevan**, [1993] 2 S.C.R. 599, Major J., for the majority stated at ¶ 35:

Both of them had lengthy criminal records, had strong motivations to lie, and approached the police only when each perceived that some benefit - - such as release from prison, a discontinuation of charges against them, or cash payments - - could be obtained in exchange for their testimony. Both of them explicitly told the police at the time they came forward that they were seeking a "deal" in exchange for their evidence against the appellants. Moreover, the evidence of Belmont and Dietrich was incriminating to the appellants, and crucial to the Crown's case.

[25] These are factors not present in this appeal, nor does this appeal have a clustering of factors that often are seen as meriting a **Vetrovec** warning.

[26] Appellate courts have not frequently or automatically found that the failure to give a **Vetrovec** warning constitutes reversible error even where there were substantial reasons to doubt a witness' credibility.

[27] For example, in **MacDonald**, *supra*, this Court held that a **Vetrovec** warning was not required for a witness who was a drug addict, with a minor criminal record, who appeared to be an accessory after the fact to the murder, and whose evidence was central to the Crown's case. Similarly, there was no error in failing to give a **Vetrovec** warning in **Campbell**, *supra*, where the witness was an accessory after the fact and her evidence was the only evidence implicating the accused.

[28] In **R. v. Pittman**, [1993] N.S.J. No. 22 (N.S.C.A.), affirmed [1994] 1 S.C.R. 148, it was held that it was not an error to fail to give a **Vetrovec** warning

concerning a crucial Crown witness, of disreputable character and with a criminal record, who had been present when the murder was committed and was a suspect at the investigative stage.

[29] In **R. v. Forrayi**, [1997] N.S.J. No. 438 (N.S.C.A.) the argument that a **Vetrovec** warning should have been given regarding two witnesses -- one of whom was arguably a shady character who had disposed of evidence and sought a benefit in exchange for his testimony, and the other who had a criminal record and made inconsistent statements -- was rejected.

[30] Similarly, in **R. v. Tran**, [2001] N.S.J. No. 2 (N.S.C.A.), this Court rejected a **Vetrovec** argument concerning a witness who had fifty-two prior criminal convictions, most relating to dishonesty, and who had received money from the Crown for his services.

[31] While there are many factors at play in these decisions, and therefore each case may be distinguished from this appeal, the general point is that a **Vetrovec** warning to the jury is not necessarily an essential intervention, even in cases where there are compelling reasons to regard a witness with marked suspicion. Recently, in **R. v. Babb**, [2002] O.J. No. 1507 (Ont.C.A.) the court commented, ". . . in our view a mere challenge to the credibility of a complainant does not give rise to the need for a **Vetrovec** warning" (¶ 7).

[145] In this case the trial judge did not give a clear sharp warning cautioning the jury about the dangers of accepting the evidence of any of the disreputable witnesses without some corroborating evidence. The appellant argues that the trial judge erred by not electing to give a **Vetrovec** warning in respect of three witnesses of questionable character: David Carvery, Wayne Wise and Margaret Hartrick. It is not clear from the record whether the trial judge addressed her mind to the possibility of giving a **Vetrovec** warning. Neither Crown counsel nor the accused mentioned the issue.

[146] Although there was no formal clear and sharp warning about the credibility of the unsavoury witnesses, some of the instructions given to the jury would have alerted them to the possibility of untrustworthy evidence. For example, the trial judge gave the jury the standard instruction with respect to assessing credibility, which included:

On the other hand, it is entirely different when a witness deliberately lies under oath. A deliberate lie under oath is always serious and may well taint the entire

testimony of a witness. There is no fixed set of rules to use in assessing the credibility of a witness, but the following are some of the things you might wish to consider. ...

Was the testimony of the witness reasonable and consistent, or did the witness contradict himself or herself? Was the witness's testimony consistent with the testimony of other witnesses? Was the witness impartial, or did he or she have some interest in the outcome of this case? Was there some reason why the witness might tend to favour the Crown or the accused? You should apply your common sense and decide what evidence you accept and how much weight or importance you wish to give to it.

[147] The trial judge also advised the jury to consider the criminal records of witnesses when assessing their credibility:

I am now going to speak to you about the criminal records of the witnesses. In this case, you heard a number of witnesses testify that they have a criminal record. You may only use the evidence of that witness's convictions to judge that witness's credibility. The criminal record is simply one factor you should consider when you decide how much weight you will place on that witness's evidence. You are free to decide that the evidence of a witness should be believed despite his or her criminal record. When you examine the criminal record of a witness you should consider four things. First, you should consider the nature of the offence or offences. In particular, you should consider whether the witness has committed an offence that involves dishonesty. A conviction for an offence that involves dishonesty obviously has more bearing on credibility than a conviction for an offence that does not involve dishonesty. Second, you should consider when the witness committed the offence or offences. A recent conviction may be more relevant to credibility than a conviction for an offence that was committed a long time ago. Third, you should consider the number of convictions. A single conviction for a criminal offence is usually less serious than a long list of convictions. Fourth, you should consider how the witness has lived since the offence, or since the last offence was committed. Is there any evidence that he or she has not lived an honest life since that time?

[148] The trial judge then listed in detail the criminal records of eleven witnesses including Wayne Wise and David Carvery. Additionally, she said this about David Carvery, a jailhouse informant:

You heard testimony that the Crown witness, David Carvery, was a prisoner at the Halifax County Correctional Centre when he said he had his conversation with

Glen Assoun. When examining the evidence of David Carvery, you may take into account his previous criminal record for the purpose of assessing his credibility. You should also keep in mind his potential motive to give evidence favourable to the Crown, and thus trying to curry favour with the authorities in order to get a lesser sentence or early release. All of these matters may be considered by you when deciding whether or not to accept all, or part, of the evidence of David Carvery.

[149] In that portion of the charge dealing with statements allegedly made by the accused, the trial judge said:

The Crown introduced into evidence oral statements allegedly made by Glen Assoun. It is up to you to decide the effect of these statements. First, you must decide whether Glen Assoun made these statements or any one of them. You cannot consider any of the statements unless you are satisfied beyond a reasonable doubt on the whole of the evidence that Glen Assoun did make that statement. If you have a reasonable doubt that Glen Assoun made these statements, or made any one of them, then you must ignore everything in that statement or statements. If you have a reasonable doubt that any part of the statement, or any one of them, was made by Glen Assoun then you must reject that part of the statement.

On the other hand, if you are satisfied beyond a reasonable doubt on the whole of the evidence that Glen Assoun did make any one or more of these statements, or any part of one of those statements, then you must go on to the second step and decide whether the statement, or that part of the statement, is true. To determine whether or not the alleged statements are true, you should consider all the evidence. Here are some examples that may help you.

Is there any evidence that appears to confirm or support the statement? Is there any evidence that appears to contradict the statement? Consider the condition of Glen Assoun at the time he is alleged to have made the statement. If he was suffering from any mental disability or was under the influence of alcohol or drugs at the time he made the statement you should take this into account when you determine the weight you will give to the statement.

With respect to the alleged admission to Wayne Wise by Glen Assoun that he killed Brenda Way, there is no confirming evidence nor contradictory evidence from other witnesses. Nor is there any evidence of the condition of the accused when it is alleged he made this admission to Wayne Wise.

...

With respect to the alleged admission by Glen Assoun in May of 1998 to David Carvery that he killed his girlfriend by slitting her throat and dumping her by a dumpster, there are no witnesses to confirm the admission . There are some witnesses, however, who gave some contradictory evidence . Juan Sanchez, Hector Deagle and Scott Keefe. There is no evidence about Glen Assoun's condition at the time he made the admission.

[150] The trial judge also cautioned the jury again about Wayne Wise's credibility in the part of the charge where she summarized the evidence:

There was testimony from five people that Glen Assoun admitted to them, or in their presence, that he killed Brenda Way. The first was Wayne Wise, a nephew of Glen Assoun, who testified that Glen Assoun told him by telephone on January 23rd, 1997, that he was hiding in Vancouver because he was a suspect in the murder of Brenda Way, and that he did it. Mr. Wise testified that he called Glen Assoun from a pay phone at K-Mart Mall in Dartmouth, and that he had enough change to pay for a 20-minute call, which he said cost \$10. He also testified that he had used crack the day he called at the time he made the call. I have already referred to the criminal record of Mr. Wise. He also testified about the circumstances of his making of his statement to the police, while he was under arrest, and on his way to the Halifax County Correctional Centre. There was also evidence that he requested favours in exchange for his testimony but he did say that his family was not brought to Nova Scotia with him when he came to testify. He also was referred to having said he called a 403 area code and said that he thought that was the area code for the West Coast.

[151] With respect to the evidence of Margaret Hartrick, in addition to the caution about her evidence not being in person, or subject to cross-examination, as set out at length at ¶ 82 *et seq.* herein, the trial judge instructed the jury as follows:

With respect to the admission allegedly made by Glen Assoun to Margaret Elizabeth "Robin" Hartrick, that he knew Brenda Way was gone at 4: 15 a.m. on November 12, 1995, there is no evidence to confirm the admission. There is contradictory evidence of Isabel Morse. There is some evidence of Glen Assoun's condition when he allegedly made that statement in the evidence of Margaret Elizabeth Hartrick herself.

[152] In **R. v. Brooks**, [2000] 1 S.C.R. 237, although the court was divided on the need for the **Vetrovec** warning, there was consensus that the two factors to consider when determining whether a **Vetrovec** warning is necessary are the credibility of

the witnesses and the importance of their testimony to the Crown's case. (¶ 4, per Bastarache, J., ¶ 89, per Major, J. and ¶ 130 -131. Binnie, J.)

[153] The appellant argues that in every case where a jailhouse informant testifies, a **Vetrovec** warning is required. We do not agree that the law has gone that far. Even in **Brooks**, where the two jailhouse informant witnesses were "important but not crucial" (¶ 90 per Major, J.) to the Crown's case, and both had lengthy criminal records of dishonesty and histories of offering to testify in criminal trials, the majority was not convinced that a new trial was necessary because of the failure to warn the jury. Three of the seven judges determined that the **Vetrovec** warning was not required and one said it was required but applied the curative provision. There, in addition to those factors, one of the witnesses unsuccessfully sought a lighter sentence in return for his testimony and the other had a history of substance abuse and an extensive psychiatric history.

[154] In our view the evidence of the unsavoury witnesses in this case is not as troubling or suspicious as that tendered by the informants in the **Brooks** case.

a. David Carvery - jailhouse informant

[155] David Carvery fits the description of jailhouse informant and he received a benefit respecting outstanding charges in exchange for his evidence. Therefore his testimony is assumed to be suspect. Mr. Carvery testified that in May, 1998 he was remanded on outstanding narcotics charges. While at the correctional centre he met and had a conversation with Mr. Assoun in which he admitted killing his ex-girlfriend by slitting her throat and dumping her body by a dumpster in Dartmouth. Mr. Carvery said that Mr. Assoun stated that the reason he killed her was that he was trying to get her off drugs and alcohol, and that she had left him. A few days later Mr. Carvery told his girlfriend about the conversation and asked her to call the police with the information. His girlfriend was a friend of Ms. Way's sister.

[156] In assessing the credibility of Mr. Carvery to determine whether a **Vetrovec** warning was required, we must look at his criminal record and his possible motive to lie under oath. He had a lengthy criminal record including convictions for assault, mischief, two counts of failure to comply with a recognizance, obstructing a police officer in the execution of his duty and three drug offences for which he received sentences of incarceration. He had no convictions for crimes involving

dishonesty or lying and he had no history of informing. Mr. Carvery gave his statement to the police before he made any deal. The agreement he later made with the Crown provided that in exchange for his co-operation in the Assoun case, he would have one of his pending cocaine trafficking charges and his possession of proceeds of crime charge stayed and on the other count of trafficking he would receive a two year sentence followed by three years probation. He testified that prior to making this deal he had been offered a five year sentence in a plea bargain on all charges, so in his mind the benefit was simply a change in type of sentence not a change in its length.

[157] Next it is necessary to determine the importance of the Carvery evidence. Was there other strong evidence to support the conviction? Yes. Mr. Carvery was one of four witnesses who testified to an admission by Mr. Assoun. Even if the evidence of Mr. Wise is not included, since it is argued that he too should have had a **Vetrovec** warning, there was the evidence of two other admissions to Ms. Cameron and M.G. in addition to all the circumstantial evidence of motive and opportunity. The evidence of Mr. Carvery was, to use the words of Bastarache, J., in **Brooks**, at ¶ 14, "important but not determinative."

[158] It is our view that, given the other Crown evidence, there were insufficient difficulties with the credibility of Mr. Carvery to require a clear and sharp warning about his evidence. Given the several parts of the charge that direct the jury to be careful when assessing credibility, generally and specifically that of Mr. Carvery, due to his criminal record and the sentencing deal, we are satisfied that the instruction by the trial judge was sufficient to bring to the jury's attention the characteristics of Mr. Carvery which detracted from his credibility. It was not reversible error for the judge to have failed to give a formal **Vetrovec** caution. We would not interfere with the decision of the trial judge.

b. Wayne Wise

[159] Wayne Wise is Mr. Assoun's nephew. He testified that in January 1997, Mr. Assoun told him in a long distance telephone conversation that he was hiding in British Columbia because he was a suspect in a murder case and he had killed his wife. Mr. Wise testified on the first day of the trial and was cross-examined by Mr. Murray on behalf of Mr. Assoun.

[160] Mr. Wise was a career criminal, an alcoholic and cocaine addict. His record consisted of more than 30 convictions for assaults, impaired driving, possession of narcotics, fraud, theft, resisting arrest, failure to comply with court orders, and uttering threats. Mr. Wise admitted to having used false names to escape detection for his crimes. He was under arrest and facing charges when he made his disclosure to police in February 1997. He sought, but did not receive, benefits in return for testifying. His attendance at trial was secured by his arrest on a Canada-wide warrant executed in Alberta.

[161] The Crown concedes that Mr. Wise was not a credible witness. It is submitted however that the jury charge was sufficient to highlight his credibility problems and that his lack of credibility was so obvious that no special **Vetrovec** warning was required. The Crown relies on cases where courts have stated that **Vetrovec** warnings are necessary where the jury may not be aware of the dangers of relying on the evidence of certain witnesses, for example, **R. v. Chandra**, [2005] A.J. No. 621 (Alta.C.A.) at ¶ 10 and **R. v. Sauvé** (2004), 182 C.C.C. (3d) 321 (application for leave to appeal dismissed January 6, 2005) where the Ontario Court of Appeal wrote:

76      The purpose of the **Vetrovec** warning is to alert the jury that there is a special need for caution in approaching the evidence of certain witnesses whose evidence plays an important role in the proof of guilt. The caution is of particular importance where there are defects in the evidence of a witness that may not be apparent to a lay trier of fact. Perhaps the most important of these is the jailhouse informer.

[162] As noted by Hart, J.A. of this court in **R. v. Pittman** *supra*, a **Vetrovec** warning, which requires the trial judge to tell the jury about the evidence that is confirmatory of the suspected evidence is sometimes not at all helpful to the accused (see also ¶ 16 per Bastarache, J. in **Brooks**). Justice Hart said: (p.44QL)

In my opinion the trial judge properly exercised her discretion in the manner in which she directed the jury in this case. It would have been obvious to anyone that Joey Pyke might have been the murderer or could have been an accomplice and was certainly an admitted alcoholic. Common sense dictates that such a witness would have to be looked at very carefully before his testimony was accepted as true. Warning a jury to this effect would have accomplished nothing. It might, on the other hand, have required the trial judge to select certain parts of the evidence and tell the jury that they could be confirmatory of Joey Pyke's testimony. This emphasis could have been to the detriment of the accused.

[163] The evidence of Mr. Wise was not crucial to the Crown's case for the same reasons that Mr. Carvery's was not, that is, that it was only one of four admissions. Given the obvious defects in his credibility and the trial judge's treatment of his evidence as quoted herein at ¶ 149 and 150, we are satisfied that on a reading of the trial judge's charge to the jury as a whole no reversible error was committed by her failure to give a **Vetrovec** warning in relation to the evidence of Mr. Wise. While it may have been a more prudent course to give the clear and sharp warning, we are not persuaded to interfere with the discretion of the trial judge.

c. Margaret Hartrick

[164] The evidence of Ms. Hartrick is outlined above in the section dealing with the first issue. Although counsel, both on appeal and at trial, and the trial judge in her charge refer at times to the evidence of Ms. Hartrick as containing a reference to the fifth confession or admission by Mr. Assoun, in our view her evidence did not clearly indicate that Mr. Assoun admitted to killing Ms. Way. That was an inference that could readily be drawn if her statements about his comments that Ms. Way was dead on the morning of the murder were believed, but we would not classify it with the other four as an actual admission to murder.

[165] Factors relevant to Ms. Hartrick's credibility include that she was a prostitute and a frequent crack cocaine user. She was in police custody being questioned about another matter about a year after the murder of Ms. Way when she first offered information about Mr. Assoun. No charges were laid in the other matter. She told the officers she had psychic visions and she lied to police about why she was involved in prostitution. Her only criminal record was for soliciting for prostitution. As well, she admitted stealing \$400 from Mr. Assoun.

[166] Ms. Hartrick's evidence was probably more important to the Crown's case than that of Messrs. Wise and Carvery because she was the only person who saw Mr. Assoun near the scene of the crime on the morning of the murder, her evidence refuted the alibi evidence and the jury asked to have it played back during their deliberations.

[167] Although Ms. Hartrick's evidence was relatively important to the Crown's case, we do not agree that she was a disreputable or unsavoury witness who required a **Vetrovec** warning. Although there may have been legitimate questions

about her credibility and memory because of her drug use and lifestyle, there was none of the other classic hallmarks of mistrust and no known motive to lie under oath. She was neither an accomplice nor a suspect in the murder. She was not a jailhouse informant and she neither sought nor received any benefits from the Crown in return for her testimony. Her minor record of petty crime, which did not include crimes of dishonesty or fraud, was insignificant. The trial judge carefully instructed the jury about the inconsistencies in Ms. Hartrick's evidence and pointed out the evidence that contradicted it. In the context of the whole charge the cautions regarding Ms. Hartrick were appropriate and satisfactory in the circumstances.

[168] This ground of appeal is dismissed.

#### **4. M.G. evidence**

[169] Mr. Assoun made three arguments with respect to Ms. M.G.'s evidence: (1) He argued the judge erred in admitting as narrative Ms. M.G.'s evidence of the circumstances under which Mr. Assoun told her he had killed Ms. Way, on the basis it was not relevant and on the basis its prejudicial value outweighed its probative value resulting in an unfair trial; (2) He argued she erred in admitting irrelevant evidence from three other witnesses concerning Mr. Assoun's wearing of an earring, carrying multiple keys and having a scar near his left eye; (3) He also argued the judge erred in charging the jury on the use it could make of Ms. M.G.'s evidence.

##### a. admission of Ms. M.G.'s evidence

###### (i) relevant/prejudicial

[170] When the trial recommenced on August 23, 1999, a *voir dire* was held to determine if Ms. M.G.'s evidence: (1) that Mr. Assoun had told her that he had killed Ms. Way; and (2) of the circumstances, the context, in which he told her this, would be admitted. The Crown sought to have Ms. M.G.'s contextual evidence admitted only as narrative, not as similar fact evidence.

[171] Ms. M.G.'s testimony at the *voir dire* is outlined in the Crown's factum:

349. On direct examination, M.G. testified that the Appellant, identified by her in Court (p.1761), had picked her up on Windmill Road, they agreed on a price for

oral sex, and the Appellant began driving out the highway toward the airport. M.G. protested the direction of travel and the Appellant assaulted her, took the money back and made her perform oral sex. M.G.'s evidence continued:

Q. You said he told you to give him -

A. Oral sex -

Q. -- oral sex.

A. -- in a way. And we went out to Burnside. And I don't know where it was we went. He made me keep my head down so I couldn't see where I was going. And we went in this place. I don't -- it had all kinds of metal and stuff. I think it was a workshop. And he made me perform oral sex on him.

And he was punching me and stuff and he slit my right nipple with a razor blade and he slit my leg. And he tied my hands behind my back and he kept hitting me and stuff. And he told me to shut up or I'll -- he'll kill me. And then the name "Putbull." He said "Pitbull." And I don't know what made me say it, but **I asked him if he killed her and he said, Yes, and I'll kill you, too, he said.** [emphasis in original]

Q. Now what was he doing when he said the name "Pitbull"?

A. He was hitting me.

Q. Anything else? What happened after that?

A. He came, and gave me my clothes back, and drove me home. And about ten minutes after that, he showed back up with my jacket. And it had a note in my pocket that said he'd kill me, too.

Q. Now you indicated that he was hitting you when he said this.

A. Yes.

Q. And then he said it and then he came. And I -

A. No. He came like 10 - 15 minutes after that.

Q. Okay. So when he was hitting you, what do you mean by -

A. He was punching me with a fist.

Q. I see. Okay. When you say "he came," what was he doing? If you can explain what he was doing.

A. Having sex with me. He raped me.

Q. Okay. So not oral sex at that time but actual sexual intercourse?

A. Yes.

Q. Okay. Now when you say he drove you home, where did he drive you, to which community?

A. He drove me to Dartmouth, down on Windmill Road. Dropped me off.

350. Substantial evidence was elicited from M.G. in support of her identification of the Appellant as her assailant. On direct examination, she described her assailant as having scruffy hair, a moustache and beard, a scar under his left eye, a bit heavier than the Appellant at trial, and carrying thirty keys on a loop on his pants (vol.V, pp.1766-1768). On cross-examination, the assailant was described as tall, medium build, beard, moustache, thin, with an earring in his right ear (vol.V, pp.1771-1772). Further, the assailant wore glasses (p.1786), was five feet six inches tall, weighed 150-160 pounds, and his hair was greyish-black about an inch and a half long (vol.VI, pp.1815-1816). M.G. also testified that she saw her assailant again the next day when he attempted to pick her up and she declined ("fuck off"; vol.V, p.1793).

351. There was a lengthy cross-examination during which the Appellant alleged that the allegation was a "fabrication" and the witness denied that it was (vol.VI, p.1824). M.G. testified that the assault occurred in or around November, 1997 (pp.1774, 1778) and explained that she delayed disclosure to the police because there was a warrant for her arrest on a prostitution charge and also because she was scared (pp.1779, 1781, 1832). She further testified that her motivation in contacting the police was, "Because I wanted to close the case", but in her KGB statement she said: "Ah, I'm not really sure. I just don't want to have guys walk all over me anymore" (pp.1831, 1833). She further testified that the assault left a scar on her breast, but her KGB statement had denied this and her explanation was that she hadn't noticed it at that time (pp.1813-1814). She maintained that her assailant had a scar under his left eye and wore an earring in his right ear (pp.1772, 1773, 1790, 1791, 1809, 1810).

352. On re-direct examination, M.G., after being referred to her first police statement, dated September 17, 1997, confirmed that the assault occurred in 1996, but could not be precise on the date (pp.1847-1848). The witness clearly had difficulty in counting back eighteen months from September, 1997 (pp.1851-1854).

[172] Evidence was also given at the *voir dire* by other witnesses to the effect that a picture of Mr. Assoun had been broadcast on television in April, 1998, that he had worn an earring and that he had a scar near his left eye. This evidence corroborated some parts of Ms. M.G.'s evidence.

[173] The judge admitted both the inculpatory statement and the contextual evidence:

M.G. testified on the *voir dire* with respect to an incident when she alleges that a man who she identified as Glen Assoun confessed to her that he had killed Pit Bull. She testified [that] is the name, and others have testified it is the nickname of the deceased, Brenda Way. That statement is admissible as an admission against interest and M.G. can testify about that. That is a common exception to the rule that an admission against interest is admissible.

The rest of her statement the Crown has submitted be admitted as part of the narrative to put it in context. I accept those submissions. In my view, the jury will have a better picture of the circumstances surrounding the admission against interest if they hear the narrative and can put the entire series of events in context. That is the events that occurred before the incident in Burnside and the events following.

In my view, it is relevant evidence, which is the first step that must be passed. It is probative evidence, and although prejudicial, the probative value far outweighs the prejudicial value. I also note in passing that admissions against interest are inherently prejudicial. But the probative value in this case outweighs the prejudicial value and the evidence will be allowed.

[174] The judge charged the jury with respect to the use it could make of evidence that had been admitted to help prove motive, malice or state of mind and which reflected on Mr. Assoun's character, including that of Ms. M.G.'s contextual evidence:

During the course of the trial, the Crown introduced evidence of certain acts or activities of Glen Assoun, either as evidence to help prove motive, malice or state of mind of Glen Assoun, or as part of a witness's narrative. This evidence also has some bearing on the character and disposition of Glen Assoun. Insofar as it relates to character and disposition, you should disregard the evidence of these acts or this activity. More specifically, you should not infer from evidence of character or disposition that Glen Assoun was a person likely to have committed the offence of second-degree murder.

The evidence to which I have referred was admissible not as evidence of Glen Assoun's character or disposition but for one or more of the following purposes: to show motive by Glen Assoun to kill Brenda Way; to show malice by Glen Assoun towards Brenda Way; to show Glen Assoun's state of mind with respect to Brenda Way; as part of the context in which other events occurred. **For example, in the case of M.G., her evidence of sexual assault, assault and uttering of death threats by Glen Assoun, was to put in context her evidence of the admission by Glen Assoun that he had killed Brenda Way.** (Emphasis added)

[175] The appellant did not argue that the judge erred in admitting his alleged inculpatory statement to Ms. M.G. although he denied its content. Rather, his argument was restricted to Ms. M.G.'s contextual evidence. He argued the judge erred in admitting as narrative Ms. M.G.'s description of the circumstances under which Mr. Assoun was alleged to have made the inculpatory statement to Ms. M.G.. He argued that the contextual evidence was either irrelevant or unduly prejudicial resulting in an unfair trial. He argued that the evidence should have been excluded altogether or should have been provided to the jury in a summary manner; "restricted... to outlining in a general way how she came into contact with [Mr. Assoun] (i.e., she was a prostitute and he hired her for sex) and during sexual intercourse he admitted to killing Pitbull".

[176] The Crown set out the law on the use of evidence for narrative and its conclusion in its factum:

372. In **R. v. Magloir** (2003), 178 C.C.C. (3d) 310 (N.S.C.A.) Oland J.A. stated, at para.23:

Narrative is evidence necessary to understand the unfolding of events surrounding the offence (see, for example, **R. v. Fair (J.E.)** (1993), 67 O.A.C. 251, 85 C.C.C. (3d) 457 sub nom. **R. v. F. (J.E.)**).

373. Narrative evidence is most frequently employed in sexual assault cases, particularly where there is a history of abuse (**R. v. A.E.R.**, [2001] O.J. No. 3222 (Ont. C.A.)). In such cases, the evidence typically takes the form of prior consistent statements. Such evidence is not admissible for its truth, nor to establish consistency, but it is admissible to, ". . . advance the story from offence to prosecution or explain why so little was done to terminate the abuse or bring the perpetrator to justice" (**R. v. J.E.F.** (1993), 85 C.C.C. (3d) 457, at p.11, Q.L.). In short, it provides context and may be relevant to credibility.

374. In its function of advancing the story, narrative evidence is not limited in purpose to providing merely a time line or chronological cohesion. For example, in **R. v. George** (1985), 23 C.C.C. (3d) 42 (B.C.C.A.), a case often cited, the victim's parents, after receiving their daughter's complaint of sexual assault, confronted the man and he admitted the allegation. Despite the prohibition against the admissibility of evidence of recent complaint, the circumstances leading up to and surrounding the admission were admissible to inform the jury as to the content or meaning of the admission: "To understand what the appellant had admitted when he was confronted by the family with the girl's story, it was necessary for the jury to know that the girl had complained of a sexual assault, and what had led to the confrontation" (per MacFarlane J.A., at p.3, Q.L.).

375. Further, as J.E.F. illustrates, narrative evidence is often relevant to credibility (see also, **R. v. Ay** (1994), 93 C.C.C. (3d) 456 (B.C.C.A.); **R. v. O.B.**, [1995] N.S.J. No. 499 (N.S.C.A.)).

376. In brief, it is submitted that narrative evidence is admissible for multiple interrelated purposes: to advance the story, to put other evidence into context so that it is understandable, to assist in evaluating the probative value of evidence and the credibility of a witness.

...

379. The purpose of narrative evidence is to assist the jury in its evaluation of other evidence admissible for its truth, including the credibility of the witness. It is fair to ask, if the narrative evidence was confined to the fact that the admission was made while the Appellant was engaged in sex with a prostitute, how would that inform the jury whether the admission was true and whether the prostitute, now a witness, was reliable and believable. Nothing in the proposed sanitized version of the narrative evidence would be of any assistance in helping the jury in determining whether the alleged admission was in fact, merely a joke, or bravado, or a lie intended to intimidate, or the confused statement of a drunkard, or whether it was accurately heard by the prostitute, or whether she had reason to lie perhaps because she had been badly abused and not paid, and so on.

[177] We agree with the Crown's outline of the purposes for which narrative evidence such as that of Ms. M.G. may be relevant, and with its conclusion. The appellant has therefore not satisfied us on the first part of this argument, that Ms. M.G.'s contextual evidence was not relevant as narrative. Without her contextual evidence, in the form in which it was given as opposed to in a summary form, the jury would not have been able to properly evaluate the alleged admission or Ms. M.G.'s credibility and reliability.

[178] With respect to the second part of his argument, that the judge erred in admitting Ms. M.G.'s contextual evidence because its prejudicial value outweighed its probative value making the trial unfair, the appellant argued that the same considerations that are relevant in determining whether similar fact evidence should be admitted, are relevant to the admission of Ms. M.G.'s contextual evidence.

[179] By referring to **R. v. Handy**, [2002] 2 S.C.R. 908, the appellant's factum set out the following with respect to the dangers of admitting similar fact evidence, which he argued was analogous to Ms. M.G.'s evidence, and his conclusion:

203. . . . In discussing the assessment of prejudice at pp. 518-521 of **Handy**, *supra*, Binnie J. referred to moral prejudice and reasoning prejudice. On the issue of moral prejudice Binnie J. stated at p. 519 of **Handy**, *supra*:

(a) Moral Prejudice

[139] It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a wrongful conviction. The forbidden chain of reasoning is to infer guilt from general disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence enshrined in ss. 7 and 11(d) of the **Canadian Charter of Rights and Freedoms**.

...

[141] Some model studies of jury behaviour have put into question the effectiveness of the trial judge's instruction as to the limited use that may be made of propensity evidence:

...

This is not to undermine our belief in the ability of the jury to do its job, but it underlines the poisonous nature of propensity evidence, and the need to maintain a high awareness of its potentially prejudicial effect.

...

205. In addressing the reasoning prejudice Binnie J. stated at pp. 520-521 of **Handy, *supra***:

(b) Reasoning Prejudice

[144] The major issue here is the distraction of members of the jury from their proper focus on the charge itself aggravated by the consumption of time in dealing with allegations of multiple incidents involving two victims in divergent circumstances rather than the single offence charged.

[145] Distraction can take different forms. In **R. v. D. (L.E.)** (1987), 20 B.C.L.R. (2d) 384, McLachlin J.A. (as she then was) observed at p. 399 that the similar facts may induce in the minds of the jury sentiments of revulsion and condemnation which might well deflect them from the rational, dispassionate analysis upon which the criminal process should rest.

[146] Further, there is a risk, evident in this case, that where the "similar facts" are denied by the accused, the court will be caught in a conflict between seeking to admit what appears to be cogent evidence bearing on a material issue and the need to avoid unfairness to the right of the accused to respond. The accused has a limited opportunity to respond. Logistical problems may be compounded by the lapse of time, surprise, and the collateral issue rule, which will prevent (in the interest of effective use of court resources) trials within trials on the similar facts. Nor is the accused allowed to counter evidence of discreditable conduct with similar fact evidence in support of his or her credibility (as discussed in **Sopinka, Lederman and Bryant, *supra***, at §11.74). Thus the practical realities of the trial process reinforce the prejudice inherent in the poisonous nature of the propensity evidence itself.

206. In weighing the probative versus prejudicial value Binnie J. stated at pp. 521-522 of **Handy, *supra***:

Justice is achieved when relevant evidence whose prejudice outweighs any probative value is excluded (**R. v. Marquard**, [1993] 4 S.C.R. 223 at p.246, 85 C.C.C. (3d) 193, 108 D.L.R. (4th) 47, and where evidence whose probative value

exceeds its prejudice (albeit an exceptional circumstance) is admitted. Justice includes society's interest in getting to the truth of the charges as well as the interest of both society and the accused in a fair process. A criminal justice system that has suffered some serious wrongful convictions in part because of misconceived notions of character and propensity should not (and does not) take lightly the dangers of misapplied propensity evidence.

...

207. The only conclusion that can be reached is that the prejudicial value of M.G.'s evidence far outweighed whatever slight probative value it might otherwise possess. The admission of this evidence thereby resulted in an unfair trial.

[180] We agree with the appellant's argument that considerations relevant to determining the admissibility of similar fact evidence were relevant to the admissibility of Ms. M.G.'s contextual evidence. Her contextual evidence revealed criminal and morally reprehensible behaviour with a poisonous potential for prejudice. However, we do not agree with the appellant that the only conclusion that can be reached with respect to Ms. M.G.'s contextual evidence after weighing these considerations is that the prejudicial value of her evidence far outweighed its probative value so that its admission resulted in an unfair trial.

[181] Rather, we agree with the respondent's analysis and its conclusion:

389. Concerning probative value, the narrative evidence was relevant to both a proper evaluation of the alleged admission and to an evaluation of the witness M.G.. Indeed, absent the narrative, there would have been no point in placing the admission into evidence simply because the jury would not have been able to give it any weight. (The strategy of opposing the admissibility of the narrative evidence at trial would simply be to render the evidence of the admission of no force and effect.)

390. Concerning reasoning prejudice, it is submitted that the narrative evidence carried little potential to distract or confuse the jury from the central issue. The positions of the parties and the supporting evidence would have been readily and clearly understood.

391. Concerning moral prejudice, evidence of this nature always carries with it a real potential to inflame the jury and yet such evidence is often admissible. While it is necessary and appropriate to be concerned about the possibility of

wrongful conviction, there should be no place in advocacy for scaremongering. The search for the truth sometimes requires evidence that has the potential to result in moral prejudice. The solution chosen by the law is to admit the evidence in most cases, while giving an appropriate limiting direction on its use to the jury. Quite recently, in **R. v. R.I.L.**, [2005] B.C.J. No. 1030 (B.C.C.A.) Prowse J.A. stated at p.6, Q.L.:

The authorities accept that juries can and will heed these instructions in reaching their verdict. The justification for trial by jury would be greatly diminished if it was not accepted that juries could and would adhere to such instructions in rendering a verdict according to law.

392. Further, it is submitted that the Appellant's factum clearly exaggerates the potential moral prejudice in this case. M.G.'s narrative evidence was akin to but quite distant from the type of evidence seen in similar fact cases. She was threatened, not killed. She received minor cuts, not fatal wounds. She was assaulted, but not kicked in a manner which by itself could have caused death. She was sexually assaulted; Brenda Way was not. Her assailant was a criminal; Brenda Way's assailant a murderer.

393. It is submitted that it is simply not a realistic conclusion that the jury would have been so inflamed by this narrative evidence that they would have reasoned in a manner expressly prohibited by the jury directions given by Hood J.

394. It is submitted that the learned trial Judge did not err in holding that the probative value of the narrative evidence outweighed its prejudicial effect.

[182] Accordingly we are satisfied the judge did not err in admitting Ms. M.G.'s evidence.

(ii) collateral evidence - re jewelry, keys, scar

[183] The appellant's second argument was that the judge erred in admitting the evidence of the other witnesses who corroborated some parts of Ms. M.G.'s evidence as to identity, when they testified that Mr. Assoun had a scar near his left eye, carried many keys and had worn an earring. He argued this evidence was not relevant just as Ms. M.G.'s contextual evidence was not relevant.

[184] For the same reasons stated above with respect to the relevance of Ms. M.G.'s contextual evidence, we are satisfied the judge did not err in admitting this evidence. This evidence was relevant to the jury's assessment of the credibility and

reliability of Ms. M.G., which was relevant to the jury's assessment of the alleged admission and to identification.

b. jury charge

[185] Finally, the appellant argued with respect to Ms. M.G.'s evidence that the judge erred by giving an insufficient direction to the jury as to the use that could be made of Ms. M.G.'s contextual evidence. He argued the charge was not adequate to inform the jury that they could not use Ms. M.G.'s contextual evidence to show propensity or bad character.

[186] As indicated in **R. v. B.(F.F.)**, [1993] 1 S.C.R. 697, the judge was required to inform the jury that they could not use Ms. M.G.'s evidence to show propensity or bad character:

[80] More specifically, the judge was required to explain clearly in the instructions to the jurors that they must not infer from the evidence that tended to show the appellant's bad character that the appellant was guilty because he is the sort of person who is likely to commit the offences in question.

[187] We are satisfied the judge did this in the portion of her charge set out in ¶ 174 above.

[188] In conclusion on the appellant's arguments with respect to the admission of Ms. M.G.'s evidence and the adequacy of the jury charge with respect to them, the appellant has not satisfied us that the judge erred. The grounds of appeal with respect to Ms. M.G.'s evidence are dismissed.

## 5. Mary Cameron's evidence (admission)

a. insufficient context to be admissible

[189] Mary Cameron testified about a conversation she overheard between Cathy Valade and Mr. Assoun a few weeks after the murder:

Q. Okay. Now you said you met him two times. Can you tell me the next time that you met him, when was that, please?

A. At Cathy Valade's house.

Q. Okay. And where was Cathy Valade's house?

A. On [Everett?] Street in Dartmouth.

Q. Okay. And approximately when did you met him at Cathy Valade's house?

A. Two weeks to a month after the murder.

Q. After what murder?

A. Brenda Way's.

Q. Okay. And can you tell me about that incident, please?

A. Me and Cathy were sitting in the living room and he came in and Cathy had [inaudible] again and they just started talking and he said, "I did it ." And she said, "What do you mean, [inaudible]?" And he said, "yes."

Q. Okay. Stop you there and I'd ask you again to speak up, please, for the record. Where was Glen and Cathy Valade sitting in the apartment?

A. On the couch.

Q. Okay. And where were you?

A. In the chair.

Q. Okay. And can you tell me the conversation again of what you heard, please?

A. He said, he told Cathy that "I did it," and she said, "Who, Brenda?" And he said "yes."

Q. Okay. And when you say "he said," who do you mean by "he"?

A. Glen.

Q. Glen who?

A. Assoun.

Q. Okay. And what happened then?

A. And I got up and went out to the kitchen and I heard him say that he got her from ear to ear and that a tip of his blade was broke off.

Q. Okay.

MR. ASSOUN Sorry, Your Honour, I didn't hear what she said that last paragraph.

MR. MACRURY Okay. Again, after you heard the first statements in the living room and you went to the kitchen, what happened -- what did you hear from the kitchen?

A. I heard him say he got her from ear to ear and that the tip of his blade was broke off.

Q. Okay. And can you describe how far the kitchen was from the living room?

A. It's almost connecting. It's like there's a little wall in between.

Q. Okay. So how far away were you from them when he made this conversation?

A. Eight to ten feet maybe.

Q. Okay. And were you able to hear that conversation?

A. Yeah, I was hearing his part of the conversation.

Q. Okay. And when you heard this conversation, what was your reaction?

A. I wanted to leave.

Q. And why did you want to leave?

A. I just didn't want to hear any more about it.

Q. Okay. And did you leave?

A. Yes.

[190] Ms. Cameron testified that she told the police about the conversation in March 1997 after she was talking to Mr. Wise's girlfriend. Cathy Valade testified that she did not recall the conversation and did not remember Ms. Cameron ever being in her apartment. The trial judge summarized the evidence for the jury as follows:

Mary Agnes "Tina" Cameron testified that she was at Cathy Valade's apartment about two weeks to a month after Brenda Way's death. She said she heard Glen Assoun tell Cathy Valade that he did it. And when Cathy Valade said, "Who, Brenda?" he replied, "Yes." She said she went out to the kitchen but heard Glen Assoun say that he got her ear to ear and that the tip of the blade broke. She admitted that she knows Wayne Wise, but not well, but that she does know his girlfriend, Carla Jenkinson. In cross-examination, she recalled that she went to the police station with Carla Jenkinson, but said she did not know if Carla knew anything about this matter until she got to the police station and found out what Carla was there for. She said she then told Carla what she knew.

Cathy Valade, however, said she did not introduce Tina to Glen Assoun and could not recall her ever being at her apartment after Brenda Way's murder because there were a lot of people coming and going, as she said. On cross-examination she agreed that she had told the Crown in May of 1999 that Tina Cameron was lying but that she also asked to be put under hypnosis in case her memory was suppressed.

[191] The appellant submits that the trial judge erred in law in admitting the evidence because the witness only heard part of the conversation and therefore it had little probative value and its prejudicial effect outweighed its probative value. The appellant relies on **R. v. Ferris**, [1994] 3 S.C.R. 756 (the majority decision of the Alberta Court of Appeal [1994] A.J. No. 19 approved by brief endorsement) and **R. v. Hunter** (2001), 155 C.C.C. (3d) 225 (Ont.C.A.).

[192] In **Ferris** a police officer overheard the accused talking to his father by telephone after he was arrested. The officer heard the accused say "...I killed David...". Conrad, J.A., for the majority of the Alberta Court of Appeal, found that the statement should not have been admitted because it was only a snippet of a conversation that had no meaning without the surrounding words. She said:

15 To be relevant, the evidence must be probative of some fact in issue. Words do not become admissible merely because they are uttered out of the mouth of the

accused. It is for the party tendering the evidence to prove the connection between the evidence tendered and the fact. In some cases the words may be relevant to the issue of credibility, but that is not the case here. There may be cases where the utterance of a single word (such as a code word) would go to prove the accused's knowledge of an important fact. The onus rests on the party tendering the evidence to prove the connection between the evidence offered and the fact. In this case the only possible relevance of these words is if they could be found to constitute an admission by the accused that he killed David. They are being tendered as proof of their contents. The issue here is not whether the officer is telling the truth that the accused uttered these words, but whether any meaning can be put on the words. Are they an admission? Certainly if they are, they are relevant and highly probative. While the jury ultimately makes that decision, the trial judge must determine whether there is evidence on which they could so decide.

16 The general rule for admissibility is that preliminary questions which are a condition of admissibility are for the trial judge in his or her capacity as judge of the law rather than judge of the fact. If factual questions must be resolved a *voir dire* may be required. (See **R. v. Evans**, [1993] 3 S.C.R. 653, October 21, 1993 S.C.C. No. 22592) In this case the factual question is whether or not there is a statement discernible of meaning. Authenticity of the words is not in issue - meaning is.

17 The facts of this case are unique in that there exist no circumstances or context from which the true meaning of the words can be inferred. It is uncontradicted that the words were part of an utterance only, and that other words passed both before and after those words. It is uncontradicted that the words could have come at the beginning of a sentence or at the end of a sentence. In fact, the words may have been a part of a question such as "You don't think I killed David?" or a statement such as "They think I killed David" or "They think I killed David but I didn't". His father could have asked him what the police think he did and he could have replied "I killed David". Those utterances do not prove any fact in issue and are not an admission of guilt. Indeed, on the basis of the uncontradicted evidence, the possibility of statements with the words "... I killed David ..." contained therein are numerous. There is no way of determining the meaning or thought to be attributed to the words. A trial judge could not ascertain, nor could the jury, the meaning of the words. The difficulty is compounded by the acknowledgement of Sergeant Schmidt that this accused was talking in a slow fashion, pausing, repeating himself or trailing off into nothing. The circumstances are all before the trial judge and he should determine whether or not the evidence is sufficient for a jury to conclude the meaning of the words. Without meaning being ascertainable the words are not relevant to any fact in issue and they have no probative value.

[193] In **Hunter** the Ontario Court of Appeal applied the reasoning in **Ferris** in ruling that a fragment of a conversation between the accused and his lawyer in a public area of the courthouse should not have been admitted. Goudge, J.A. for the Court stated:

19 In my view, Sopinka J.'s reasoning [in **Ferris**] is anchored in the important role that context can play in giving meaning to spoken words. Where an overheard utterance is known to have a verbal context, but that context is itself unknown, it may be impossible to know the meaning of the overheard words or to otherwise conclude that those words represent a complete thought regardless of context. Even if the overheard words can be said to have any relevance, where their meaning is speculative and their probative value therefore tenuous yet their prejudicial effect substantial, the overheard words should be excluded.

20 When the principles derived from **Ferris** are applied to this case, I think the evidence must be excluded as it was in **Ferris**. The only possible relevance of the overheard utterance is if it could be found to constitute an admission by the appellant that he had a gun. Here, as in **Ferris**, the trial judge found that the overheard utterance had a verbal context, which is unknown and that it was part of a fuller statement. That statement may have been a statement such as "I could say I had a gun, but I didn't point it, but I won't because it is not true" or "What if the jury finds I had a gun but I didn't point it -- is that aggravated assault?". Neither would constitute an admission. Indeed, given the reasoning of the trial judge, had these possibilities been pointed out to him he might well have reached a different conclusion.

21 In my view, without the surrounding words, it would be impossible for a properly instructed jury to conclude that the overheard utterance was an admission or perhaps even what it meant. Clearly its meaning remains highly speculative. The trier of fact would have to guess at the words that came before and after to fix on a meaning. Since its meaning is highly speculative, its probative value is correspondingly tenuous. However, the substantial prejudicial effect is obvious. This balance clearly favours exclusion of the overheard utterance and, as in **Ferris**, that should have been the result.

[194] The appellant says that the evidence of Ms. Cameron likewise contained only snippets or fragments of a longer conversation between Mr. Assoun and Ms. Valade and that without more context such as the parts of the conversation before and after the alleged admission, the words are meaningless and thus should not have been admitted. It is submitted that Mr. Assoun could have said something like "... the

police think I did it.." or "...her family are saying I did it...". As for the second part which Ms. Cameron said she overheard while in the kitchen, the appellant says it too was a snippet since there was no evidence of what the accused and Ms. Valade said before and after the words " he got her from ear to ear and the tip of his blade was broke off".

[195] The appellant's argument might have more merit if the only words overheard were "I did it". However, unlike both **Ferris** and **Hunter**, more of the conversation was reported by Ms. Cameron. To start with, there is the question by Ms. Valade "Who Brenda?" and the answer by Mr. Assoun of "Yes". There is Ms. Cameron's reported discomfort at hearing the conversation and wanting to leave. On cross-examination she explained that "she did not want to be involved" and she did not think they should be discussing these matters in her presence. But more importantly is the context provided by the second part which Ms. Cameron said she heard while in the kitchen about getting her from ear to ear and the knife tip breaking. It is difficult to add words before and after that statement that might give the words an exculpatory meaning as in **Ferris** and **Hunter** and the appellant does not offer any possibilities. The police and the deceased's family would not be alleging that the knife broke because there was no evidence suggesting that. If the tip of the knife broke, that would be known only to the murderer.

[196] We are not satisfied that there was any error of law in admitting the evidence of Ms. Cameron and this ground of appeal is therefore dismissed.

## 6. Miscellaneous admissibility issues

- a. threats with and purchase of a gun
- b. numerous assaults and threats

[197] The appellant submits that the trial judge erred by allowing various categories of inadmissible evidence before the jury. Although individually the errors may not have been significant, he argues that the cumulative of them was highly prejudicial.

[198] The first category of evidence under this ground of appeal is that concerning the appellant's purchase and use of a gun and the evidence of threatening and assaultive behaviour towards Ms. Way. Several witnesses testified that Mr. Assoun

and Ms. Way had a rocky relationship in which they often fought verbally and physically. There were several reports that Ms. Way had bruises caused by Mr. Assoun. Three witnesses, Jane Downey, David O'Neill and David Way testified that the appellant had threatened Ms. Way with a gun. Ms. Valade and Mr. Corbin both testified that the appellant had possession of one or more guns. The appellant says this evidence was not relevant because the murder was committed with a knife, not a gun. Irrelevant evidence is inadmissible he submits. Furthermore he says its probative value was far outweighed by its prejudicial effect.

[199] The evidence in question was admitted after the *voir dire* discussed in detail within the second issue commencing at ¶ 100 above. Mr. Assoun was represented by Mr. Murray during the *voir dire*. The evidence respecting the threats with a gun and the purchase of a gun were admitted as evidence of Mr. Assoun's hostile intent, motive and state of mind and Ms. Way's state of mind. Some of it was not hearsay and was admitted to prove truth as original evidence, some of it was found to be hearsay but was admitted under the principled exception to the hearsay rule. The evidence of statements made by the deceased relating to alleged assaults by the appellant was dealt with under issue 2 herein and it is not necessary to restate our conclusions in that respect.

[200] Evidence of motive is generally relevant to the issue of identity: **R. v. R.P.**, *supra* (¶ 116); **Lewis v. The Queen**, [1979] 2 S.C.R. 821. Evidence of the deceased's state of mind and the state of the relationship between the accused and the deceased is also relevant to motive and thus to identity. In **R.P.**, *supra*, Doherty, J., as he then was, at p. 339 explained the logic as follows:

Relevance is a matter of inductive logic requiring that the trial judge examine the proffered evidence in light of his own knowledge and understanding of human conduct: **McCormick**, *ibid.*, p. 544; **Delisle**, *ibid.*, p. 10. Relevance is situational and depends not only on the ultimate issue in the case (e.g., identification), but also on the other factual issues which either of the litigants raises as relevant to the ultimate issue. Consequently, the deceased's mental state may bear no direct relevance to the ultimate issue of identification but it will none the less be relevant to that issue if it is relevant to another fact (e.g., motive) which is directly relevant to the ultimate issue of identification.

[201] Here the evidence of the gun was relevant to the fear that Ms. Way expressed which stemmed from his possession of a gun and the threats and assaults. The

evidence was not admitted to show character or propensity and the trial judge clearly instructed the jury not to use it improperly:

During the course of the trial, the Crown introduced evidence of certain acts or activities of Glen Assoun, either as evidence to help prove motive, malice or state of mind of Glen Assoun, or as a part of a witness's narrative. This evidence also has some bearing on the character and disposition of Glen Assoun. Insofar as it relates to character and disposition, you should disregard the evidence of these acts or this activity. More specifically, you should not infer from evidence of character or disposition that Glen Assoun was a person likely to have committed the offence of second-degree murder.

- c. Jane Downey's finding of the broken-tipped knife
- d. Evidence that the appellant carried knives

[202] The next category of evidence the appellant submits was inadmissible is the testimony of Jane Downey, Ms. Way's sister, about finding a knife with a broken tip near the scene of the murder a year and a half later. Ms. Downie indicated that some time prior to finding the knife she was told by a psychic that her sister had been killed by a knife with a broken tip. Additionally, the appellant argues that all the evidence indicating that the appellant habitually carried a knife and spoke about obtaining a new knife was inadmissible and its prejudicial effect outweighed the probative value. It is submitted that since there was no evidence that any of the knives the appellant allegedly carried matched the murder weapon that the knife evidence was simply more evidence of propensity and thus inadmissible.

[203] The evidence of Jane Downey tends to lend support to the evidence of Ms. Cameron about what she heard Mr. Assoun say about breaking the tip off the knife when he cut Brenda's throat. The knife itself was real evidence that coincided with the appellant's description of the murder weapon. The evidence, although circumstantial, if accepted by the jury, was highly relevant to the issue of identity. The evidence of all the witnesses who testified about Mr. Assoun's habit of carrying a knife is similarly relevant to the issues of opportunity and ability to carry out the murder in the manner in which it was committed.

[204] A similar argument was made in **R. v. Kinkead** (2003), 178 C.C.C. (3d) 534 (O.C.A.). In that case Kinkead and Ranger were charged with the murder of two young women in their own home. They were tried separately. The medical evidence

indicated that the women had been stabbed to death, probably by two attackers. At Kinkead's trial, the trial judge admitted evidence that Kinkead possessed and used knives and had once used a knife to threaten someone in Ranger's presence. The evidence was admissible to demonstrate that the accused possessed a necessary tool for committing the offence, to show Ranger's state of mind, namely that he knew the type of person with whom he was associating, and to rebut a defence of innocent association. On appeal that decision was upheld. Simmons, J.A. for the court wrote:

[80] Moreover, I reject Kinkead's suggestion that the impugned evidence carried *significant* potential prejudice. The risk of reasoning prejudice was minimal. The evidence was straightforward and unlikely to confuse the jury or consume an inordinate amount of time.

[81] The risk of moral prejudice was also limited. As noted by the trial judge, none of the impugned evidence was "highly discreditable". In the context of a murder trial, there was little risk that the jury would convict Kinkead to punish him for his past conduct of carrying a knife, sharpening it regularly, and, on one occasion, threatening Burey. Nor, in my view, is it likely that the jury would have used the evidence that Kinkead carried a knife and sharpened it regularly to conclude that he was the type of person who would commit a planned and deliberate murder.

[82] Similarly, it is not likely that the jury would have used Burey's evidence that, on one occasion, Kinkead "snapped", threatened her with a knife, and then subsequently apologized, standing on its own, to draw that inference. Rather, the probative force of the discreditable conduct evidence arose from Kinkead's connection to Ranger, from Ranger's presence during the incident that Burey described, and from the likelihood that, if Kinkead was at the house, it was because Ranger had recruited him.

[83] The trial judge made specific findings that the impugned evidence was not highly discreditable and that it did not "of itself infer guilt". He concluded that Daniel's evidence that Kinkead had a habit, in the past, of carrying a knife similar to the murder weapon(s) had sufficient probative value on the issue of whether Kinkead possessed or supplied the murder weapon to justify its admission. The trial judge also concluded that Burey's evidence that Ranger was aware of Kinkead's threatening conduct was sufficiently probative of the specific inference that Ranger recruited Kinkead to warrant its admission. None of these findings is unreasonable.

[84] In the circumstances, I see no basis for second guessing the trial judge's assessment of probative value versus prejudicial effect.

[205] The same reasoning applies here. The probative value of all of the knife evidence in the circumstances of this case far outweighed its prejudicial effect. The jury was properly instructed on the use of the discreditable conduct evidence and would not likely be confused or inflamed or use it for an improper purpose.

e. vehicle similarity

[206] Stephen Assoun, the appellant's nephew, testified that the appellant owned a red and white Chev Scotsdale truck at the time of the murder. He testified that the appellant's truck looked similar to a Chev Blazer. He indicated that he worked on cars every day for five years or so. The Crown presented this evidence because Mr. McMaster, a cab driver, had seen Ms. Way get into a red Blazer or Jimmy at around 2:00 am on the morning of the murder. On cross-examination the witness admitted he could be mistaken about when Mr. Assoun acquired the red truck, and two other witnesses testified that Mr. Assoun acquired his red truck sometime after the murder.

[207] The appellant submits that Stephen Assoun's evidence about the appellant's truck looking like a Blazer should not have been admitted because it lacked relevance and the witness was not qualified as an expert in identifying motor vehicles.

[208] The Crown in reply submits that this evidence is "innocuous". We would agree. Although there was plenty of evidence about different cars and trucks in which Ms. Way had been seen on the night of the murder, none of it was particularly probative of any fact in issue. Mostly, it was part of the narrative, used to explain her whereabouts at approximate times. In the end there was no evidence establishing the colour or make of the vehicle driven by the murderer. Neither Mr. Assoun nor the Crown mentioned the cars, or referred to any red truck in their closing remarks.

[209] Lay witnesses are entitled to express an opinion about the condition of a person or a thing that they have observed. In **R. v. Graat** [1982] 2 S.C.R. 819, Dickson, J., as he then was, said:

The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list mentioned in **Sherrard v. Jacob**, *supra*, is by no means exhaustive: (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person--e.g. whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things--e.g. worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.

[210] Other than its possible lack of relevance, we see nothing wrong with allowing the admission of the evidence of Stephen Assoun that in his view one make of truck looks like another make.

[211] While there may have been some error in allowing the admission of irrelevant evidence, we are of the view that this was not an error that should result in a new trial in this case. The admissible evidence before the jury in this case was substantial and we do not consider that a slight error in the admission of innocuous irrelevant evidence had the capacity to work any injustice to the appellant. It could not have factored into the verdict of the jury. It would therefore be an appropriate case in which to invoke the provisions of s. 686(1)(b)(iii).

f. evidence of the jailhouse informant - David Carvery

g. evidence of Wayne Wise

[212] The evidence of these two witnesses was dealt with in detail under issue 3 when discussing the **Vetrovec** warning grounds of appeal. Under this issue the appellant submits the evidence of Carvery and Wise was too unreliable and so highly prejudicial that it should not have been admitted. We see no merit in this ground of appeal. In exercising the discretion to exclude relevant evidence because its prejudicial effect outweighs its probative value, the trial judge must attempt to guard against the admission of evidence that will be misused resulting in undue prejudice to the accused. Prejudice in this context does not mean that it will be used to find guilt. As noted by Cromwell, J.A. in **R. v. Barnes**, 2004 NSCA 25:

[51] . . . Prejudice to the accused in this context refers to the impairment of the accused's right to a fair trial or that the evidence would be misused by the trier of fact, not to the inculpatory force of the evidence: **R. v. Tran** (2001), 190 N.S.R. (2d) 481; [2001] N.S.J. No. 2 (Q.L.)(C.A.) at paras. 26 and 28.

[213] An argument similar to that being made by Mr. Assoun was made by the appellant in **R. v. MacDonald**, *supra*, (¶ 76). The statements of Chipman, J.A. appropriately determine the argument of the appellant on this point:

[93] The appellant's counsel submits that the trial judge should have exercised a residual discretion and denied the Crown permission to call the jailhouse informant Ricky Williams. It is submitted that a residual discretion to reject evidence in criminal cases has been evolving over the years. Reference has been made to the discussion of this subject in the **Kaufman Report** that was commissioned as a result of the wrongful conviction of Guy Paul Morin. Appellant's counsel referred to the decision of the Ontario Court of Appeal in **R. v. Brooks** (1999), 129 C.C.C. (3d) 227 which held that in a case where the evidence of two jailhouse informants played a central role in the Crown's case, the trial judge erred in law in not giving a **Vetrovec** type warning to a jury respecting the evidence of unsavoury witnesses. That decision has since been overruled by the Supreme Court of Canada: **R. v. Brooks** (2000), 141 C.C.C. (3d) 321.

[94] **Brooks**, *supra*, is not an authority for the proposition that a trial judge has a residual discretion to prevent the Crown from calling unsavoury witnesses, such as jailhouse informants. In that case, the majority of the judges in both the Ontario Court of Appeal and the Supreme Court of Canada were of the view that the trial judge should have given a so-called **Vetrovec** warning in the circumstances. None of the judges in either court suggested that the trial judge had a discretion to exclude the evidence of so-called unsavoury witnesses, or that the accused had any right to have their evidence excluded.

[214] We conclude that none of the seven points raised in this ground of appeal has merit either individually or collectively. There is no adverse cumulative effect.

## 7. Manslaughter - failure to leave with jury as included offence

[215] The appellant submits that the trial judge erred by not instructing the jury on the possibility of finding the accused guilty of the included offence of manslaughter. It is submitted that there was sufficient evidence of both intoxication and provocation to provide an evidentiary basis for the instruction, although counsel does not refer in his factum to the specific evidence he relies on in relation to this issue.

[216] It is well established that the relevant test on whether to put a defence to a jury is whether on the evidence the defence has an air of reality. The Supreme Court of Canada recently confirmed that test in **R. v. Gunning**, 2005 SCC 27, where on a charge of second degree murder the trial judge correctly instructed the jury on the defences of intoxication and provocation, but improperly told them that the underlying unlawful act of careless use of a firearm had been proven and did not instruct them on the defence of defence of property. Justice Charron for the unanimous court stated:

29 As a corollary of the trial judge's duty to instruct the jury on the law, it is a well-established principle that a judge should withdraw a defence from the consideration of the jury when there is no evidence upon which a properly instructed jury acting reasonably could find in the accused's favour. In these circumstances, it only stands to reason that there is no need to direct the jury on an issue not raised in the case. It would only serve to confuse the jury and detract from their duty to return a true verdict. This threshold test, requiring that a defence be put to the jury only if there is an evidential foundation for it, is often referred to as the "air of reality" test.

...

32 The "air of reality" test applies, rather, in respect of affirmative defences that may or may not arise depending on the particular facts. For example, it is not in every case that defences such as the following will arise: intoxication, necessity, duress, provocation, alibi, automatism, self-defence, mistake of fact, honest but mistaken belief in consent or defence of property. It is not incumbent on the Crown in every trial to negative all conceivable defences no matter how fanciful or speculative they may be. A certain threshold must be met before the issue is "put in play": **R. v. Cinous**, [2002] 2 S.C.R. 3, 2002 SCC 29, at para. 52. A defence will be in play whenever a properly instructed jury could reasonably, on account of the evidence, conclude in favour of the accused: **R. v. Fontaine**, [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 74.

[217] Mr. Assoun's defence at the trial was a complete denial supported by an alibi. There was no hint by Mr. Murray while he represented the appellant that there might be a defence of intoxication or provocation and Mr. Assoun made no attempt to put any evidence before the court that could raise those issues. When asked by the trial judge to comment on her plan not to instruct on manslaughter, Mr. Assoun said "I won't even comment on that, I can't". It would have been absurd for the accused to say to the jury "I did not kill her, I was not there, but if you do not accept

that, then I killed her when I was drunk and/or because she provoked me". Leaving inconsistent defences with a jury might tend to either confuse them or substantially weaken the first defence of alibi, which if it raised a reasonable doubt would lead to an acquittal, while either of the other defences if successful would lead to a conviction for manslaughter. However, despite that possibility, if there was any evidence supporting an intoxication or provocation defence to the murder charge, then manslaughter as an alternative verdict should have been left with the jury.

[218] There was evidence that the appellant was drunk when he allegedly assaulted Ms. Way a month before the murder, but there was very little evidence of his sobriety or lack thereof on November 11 -12, 1995 and no evidence on the effect any alcohol or drug consumption may have had on his intentions at the relevant time. Isabel Morse, his alibi witness, testified that Mr. Assoun had a couple of beers and a puff of a joint sometime before Mr. Badakhsham took Ms. Gavel to work in Halifax at 10:00 pm on November 11, 1995. There was no evidence from Ms. Gavel and Mr. Badakhsham about the appellant's consumption of alcohol or drugs that evening.

[219] The only other evidence that could possibly be considered as supporting an intoxication defence is contained in the Margaret Hartrick statement, where she said:

... He looked like he was on drugs, but I know Glen doesn't do drugs. He looked right spacey, like he wasn't at all there. . . His arm was right shaky, so I held his arm while he looked at his watch. He said it was 4:15 a.m....

[220] This sketchy evidence falls far short of creating an air of reality to the intoxication defence. In **Lemky v. The Queen** (1996) 105 C.C.C. (3d) 137 (S.C.C.) McLachlin J., as she then was, summarized the evidence that the accused had been drinking, as follows:

4 The evidence on the appellant's state of inebriation before the shooting was conflicting. Some saw him as loud and obnoxious at the dance. The bartender at the dance served Lemky some beer and noticed that "he had a few drinks before that". Another witness testified that the appellant showed no signs of intoxication, and seemed "very straight". At 11:03, immediately after the shooting, the police noted alcohol on his breath and that his eyes were watery and bloodshot. The breathalyzer test taken about three-quarters of an hour later showed a reading of 130 mg of alcohol per 100 ml of blood. When asked about his consumption of

alcohol that evening in the course of his initial interview with the police following the shooting, Lemky responded that he had consumed about one-half of the bottle of whisky brought by Valachy, followed by about three more drinks at the dance, and said: "Oh, uh, I had quite a bit to drink."

[221] The Court decided that there was no air of reality to the intoxication defence:

19 On the law discussed above, was there sufficient evidence to permit a reasonable inference that the accused might not have known that shooting Michelle Cummins was likely to result in her death? Was the evidence sufficient, to use the common legal phrase, to give this defence an "air of reality"? Neither party disputes the conclusion of the Court of Appeal that the evidence was insufficient to raise a reasonable inference that the accused lacked the capacity to foresee the consequences of his act. The only question is whether, accepting the law as stated above, there was nevertheless sufficient evidence to permit a reasonable inference that, notwithstanding his capacity to foresee the consequences of his acts, the accused in fact did not foresee them. If there was, then the jury should have been instructed that if they entertained a reasonable doubt about this element of the offence they must acquit the accused of second degree murder and return a verdict of guilty of the included offence of manslaughter.

20 In my view, the evidence, considered most favourably for the accused, falls short of supporting such an inference. His blood-alcohol level shortly after the shooting was only slightly over the legal limit for driving an automobile. He carried out purposeful actions both before and after the shooting, actions which ranged from ordering drinks at the dance beforehand to calling his mother and the police immediately afterward. His conduct before and after the shooting demonstrated an awareness of the consequences of what he was doing. This demonstrates that he in fact foresaw the consequences of what he was doing immediately before and after the shooting.

[222] Here the evidence relating to Mr. Assoun's capacity to form the intent to murder is an entirely insufficient basis to create an air of reality to support a charge on intoxication.

[223] Although there was a good deal of evidence relating to a tumultuous relationship between Mr. Assoun and Ms. Way, there was absolutely no evidence capable of lending any support to a valid defence that he acted in the heat of passion after being provoked by her at a time proximate to the murder.

[224] In our view the trial judge did not err by failing to instruct the jury on the alternative verdict of manslaughter because there was no air of reality to either the intoxication or the provocation defences.

## 8. Conduct of the Crown

[225] Mr. Assoun says that Crown counsel acted inappropriately during the trial. He points to the objections during Mr. Assoun's examination of witnesses, in particular several occasions when both Crown counsel objected during the testimony of a witness. Mr. Assoun refers to the Crown's interjections during his closing argument. He requests a new trial.

### a. the legal principles

[226] In **R. v. Regan**, [2002] 1 S.C.R. 297, at ¶ 65, Justice LeBel for the majority reaffirmed the "seminal concept of the Crown as 'Minister of Justice'" from **Boucher v. The Queen**, [1955] S.C.R. 16, at pp. 23-24, per Rand, J.:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

[227] The legitimate role of Crown counsel during a trial assumes an adversarial process that is essential to our system of criminal justice. In **R. v. Cook**, [1997] 1 S.C.R. 1113, at ¶ 21, Justice L'Heureux-Dubé for the court stated:

21 Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence (**Boucher v. The Queen**, [1955] S.C.R. 16; **Power, supra**, at p. 616), it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth: see, for example, **R. v. Gruenke**, [1991] 3 S.C.R. 263, at p. 295, *per* L'Heureux-Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a

critical element of this country's criminal law mechanism: **R. v. Bain**, [1992] 1 S.C.R. 91; **R. v. Jones**, [1994] 2 S.C.R. 229; **Boucher**, *supra*. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function.

Justice L'Heureux-Dubé noted later:

39 . . . The adversarial nature of the trial process has been recognized as a principle of fundamental justice (**R. v. Swain**, [1991] 1 S.C.R. 933). As such it should be construed in a way that strikes a fair balance between the interests of the accused and those of society: **R. v. Levogiannis**, [1993] 4 S.C.R. 475; **Cunningham v. Canada**, [1993] 2 S.C.R. 143, at p. 148; **Re B.C. Motor Vehicle Act**, [1985] 2 S.C.R. 486.

[228] Counsel for the Crown is entitled to act as an advocate and to vigorously pursue a legitimate result. As stated in **Boucher**, this should not be with the object of winning. Rather, as stated in **Cook**, it is to see that justice is done within the adversarial process.

[229] With those parameters we will consider the conduct of the Crown here.

b. the Crown's assistance

[230] In June of 1999 after Mr. Assoun discharged his lawyer, counsel for the Crown said on the record that Mr. Assoun would be better served with legal representation. The Crown agreed to several adjournments so Mr. Assoun could retain another lawyer. The Crown repeatedly recommended that the court consider appointing an *amicus curiae* and that Mr. Assoun apply for legal aid. The Crown gave Mr. Assoun a legal aid application form.

[231] Mr. Assoun declined the *amicus curiae*. He did not submit the application for legal aid.

[232] The Crown made available to the trial judge an article from the National Criminal Law Program which cited the responsibilities of the trial judge for an unrepresented accused. During the trial the Crown agreed to several adjournments so Mr. Assoun could secure the attendance of witnesses or prepare his questioning.

The Crown offered to assist Mr. Assoun to serve subpoenas and to bring subpoenaed witnesses to court.

[233] The Crown provided Mr. Assoun with a **Criminal Code**, and copies of authorities on reasonable doubt and third party suspect evidence.

[234] The Crown suggested deletion of extracts from admitted *voir dire* statements where the prejudice to Mr. Assoun would outweigh probative value, or which contained hearsay, or which would reflect badly on Mr. Assoun's character. When Mr. Assoun questioned witnesses about his good character, the Crown brought to Mr. Assoun's attention the consequences of raising character as an issue, so Mr. Assoun could assess whether or not to pursue that topic. When the Crown objected to inappropriate questions from Mr. Assoun, the Crown regularly suggested how Mr. Assoun could properly phrase the question. The Crown outlined to Mr. Assoun the approach to refresh a witness' memory and challenge a witness with a prior inconsistent statement.

[235] The Crown specifically advised Mr. Assoun to obtain legal advice on whether or not Mr. Assoun should testify.

c. Mr. Assoun's submissions

[236] Counsel for Mr. Assoun says that the Crown regularly objected to Mr. Assoun's questions to witnesses.

[237] The transcript discloses a pattern. Mr. Assoun, during his questions in the presence of the jury, would give evidence, in effect addressing the jury. These were not just leading questions on cross-examination, but statements of fact to witnesses with no personal knowledge. The Crown would object. The trial judge would instruct Mr. Assoun that he must ask questions, that the evidence must come from the witness, and that Mr. Assoun could not testify from the counsel table. There were other inappropriate questions, such as Mr. Assoun reading to the witness a statement ruled inadmissible at a *voir dire*, or requesting one witness to comment on the credibility of another witness, or making misleading comments to the witness about the contents of the statement. Such questions triggered objections from the Crown.

[238] On this appeal, counsel for Mr. Assoun did not say that the Crown's objections on these matters were unfounded. Rather it was suggested that, because Mr. Assoun was unrepresented, Mr. Assoun should have leeway with the rules of evidence.

[239] We disagree. The jury should not hear inadmissible evidence, whether the accused has counsel or is unrepresented. Objections to questions that would elicit inadmissible evidence are legitimate. When the unrepresented party is struggling with the form of a question, one would expect the Crown or trial judge to suggest appropriate phrasing - and that occurred here. Had the Crown persisted with baseless objections despite being overruled by the trial judge, one might consider whether the Crown's aim was illegitimately to disrupt the defence. Nothing like that occurred here. To the contrary, as one reads through the transcript, it becomes apparent that Mr. Assoun was trifling with the repeated directions from the trial judge that he should not give evidence from his counsel table.

[240] Counsel for Mr. Assoun also points to the interjections by Crown counsel during Mr. Assoun's closing argument. The trial judge had, throughout the trial, directed Mr. Assoun that he could not address the jury from the counsel table while questioning a witness. Mr. Assoun had been told that only admitted evidence and sworn testimony could be considered by the jury. Mr. Assoun had assured the trial judge that he understood this principle. Before closing addresses, the trial judge reminded Mr. Assoun that, as he had not testified, he could relate only those facts which were in evidence through other witnesses. Yet, in his closing address, Mr. Assoun again stated facts which had not been the subject of testimony. This prompted objections from the Crown. The trial judge directed Mr. Assoun not to give evidence in his closing address.

[241] The Crown's interjections were legitimate. The alternative would be to allow Mr. Assoun to address the jury with facts not in evidence. The flexibility which Mr. Assoun's counsel requests for an unrepresented party is not a licence to disregard the basic procedural principles that govern a criminal trial.

[242] Counsel for Mr. Assoun on this appeal took particular exception to the several occasions when both counsel for the Crown objected to Mr. Assoun's questions to a single witness. During his cross-examination of Mary Cameron, there were twelve objections, five by one Crown counsel and seven by the other. The

Crown acknowledged on this appeal, and the court agrees, that one counsel should take the lead for each witness.

[243] Counsel for Mr. Assoun submitted that the Crown's conduct justified an order for a new trial. To achieve this result it would be necessary that Crown misconduct caused a miscarriage of justice under s. 686(1)(a)(iii) of the **Code**. In **R. v. Wolkins**, 2005 NSCA 2, this court defined the two classes of miscarriage of justice. First is a conviction after an unfair trial. Second is a trial which includes an appearance of unfairness so serious as to shake public confidence in the administration of justice.

[244] In this case nothing resulted from any conduct by the Crown which fits either category of miscarriage of justice. The rules of evidence and procedure are safeguards to ensure a fair trial. The Crown's objections to Mr. Assoun's inappropriate questions to witnesses, giving of evidence from the counsel table, and relating facts not in evidence during his closing address, were legitimate efforts by the Crown to see that the trial was fair. The only inappropriate conduct was the few instances when both Crowns objected to Mr. Assoun's examination of a witness. The objections themselves were well-founded in substance. The counsel twinning, though excessively exuberant, did not occasion a miscarriage of justice, impair trial fairness or shake public confidence in the administration of justice.

[245] We would dismiss this ground of appeal.

## **9. Conduct of the Trial Judge**

[246] Mr. Assoun says that the trial judge failed in her duty to assist an unrepresented litigant, and this entitles Mr. Assoun to a new trial.

### a. Mr. Assoun's legal representation

[247] To give this submission context, we will review the circumstances of Mr. Assoun's legal representation.

[248] The Crown made substantial pre-trial disclosures to Mr. Assoun. At the time of these disclosures, Mr. Assoun was represented by Donald Murray, a senior criminal counsel.

[249] On April 12-15, 1999, the trial judge conducted *voir dires*. The trial judge gave her decision on April 15, 1999. On May 20, 21 and 28, 1999, the trial judge conducted another *voir dire* with the decision on June 1, 1999. On May 31 and June 1, 1999 the trial judge conducted a further *voir dire*. Throughout, Mr. Assoun was represented by Mr. Murray. These *voir dires*, during which 28 witnesses testified, occurred before the jury was empanelled.

[250] On June 1, 1999 the jury was selected and sworn. On June 1-3 the Crown called nine witnesses. Mr. Murray represented Mr. Assoun for jury selection and during this testimony.

[251] On the morning of June 4, 1999 Mr. Assoun notified the court that he had discharged Mr. Murray.

[252] On June 4, the trial judge told Mr. Assoun that there were limits to the assistance which a trial judge could provide to an unrepresented litigant. The trial judge recommended that Mr. Assoun retain another lawyer, and adjourned the trial to June 7<sup>th</sup> so Mr. Assoun could seek counsel.

[253] On June 7<sup>th</sup> the proceeding resumed. Mr. Assoun requested a mistrial. The trial judge said that this disposition was premature. She again suggested that Mr. Assoun obtain counsel. The trial judge discussed the possibility of an *amicus curiae*, declined by Mr. Assoun. The trial judge adjourned the matter to June 9 so Mr. Assoun could retain counsel.

[254] On June 9, 1999 Mr. Assoun was accompanied by counsel, Mr Patrick Atherton, who said that he needed until September to prepare for trial. Mr. Atherton proposed that the jury be discharged and a new jury later be empanelled to restart the trial. The trial judge preferred not to discharge the jury and, considering the convenience of the empanelled jury, preferred to adjourn to late August 1999. Mr. Atherton said that this was insufficient and he declined to represent Mr. Assoun. Mr. Assoun said he would represent himself. The trial judge recommended to Mr. Assoun that he apply for legal aid. The Crown provided Mr. Assoun with a legal aid application form.

[255] The trial judge canvassed the jury's availability and adjourned for two and one half months to August 23, 1999. This was to permit Mr. Assoun to obtain counsel. The trial judge told Mr. Assoun that the trial would proceed on August 23,

1999 whether or not Mr. Assoun had counsel. On June 10, 1999, the trial judge gave Mr. Assoun a lengthy explanation of the trial process, burden and standard of proof, the questioning of witnesses, objections, calling of evidence by the defence, Mr. Assoun's option to testify, the elements of the offence, and the trial judge's role to control the trial.

[256] On August 23, 1999 Mr. Assoun had not retained counsel. He had not filed the application for legal aid which the Crown had given to Mr. Assoun in June. During the discussion on August 23, the trial judge said:

But you've chosen to represent yourself, you're entitled to do that. We can't force you to have a lawyer. You've chosen not to have a lawyer. We gave you enough time so that you could have retained counsel if you had so wished.

[257] Mr. Assoun's initial notice of appeal, dated October 13, 1999 and signed by Mr. Assoun, said:

The trial erred in law by forcing the defendant who only has limited education to proceed as his own lawyer, after he dismissed counsel. Request counsel, wanted new counsel, forced to proceed without.

On May 13, 2005 Mr. Assoun's amended notice of appeal, signed by his appeal counsel, abandoned this ground of appeal. At the hearing of the appeal, Mr Assoun's counsel stated that Mr. Assoun advanced no ground of appeal that he was denied counsel or that his trial was such that required legal representation. Those issues are not before this court on the appeal. The issue is, given that Mr. Assoun was unrepresented, whether the trial judge failed in her responsibility to an unrepresented defendant in a prosecution.

b. legal principles

[258] The trial judge's responsibilities are governed by the following principles.

[259] In **R. v. Halnuck** (1996), 151 N.S.R. (2d) 81 (C.A.), affirmed (1996), 158 N.S.R. (2d) 125 (S.C.C.), Chief Justice Clarke defined the standard of assistance required by a trial judge to an unrepresented party:

49 The extent of assistance required of the trial judge is described by Griffiths, J.A. in **R. v. McGibbon** (1988), 45 C.C.C. (3d) 334, (Ont. C.A.) at p. 347:

Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion.

50 Justice Roscoe of this Court referred with approval to **McGibbon** in **R. v. Kennie (G.D.)** (1993), 121 N.S.R. (2d) 91 at 97 (para. 9). She continued in para. 10:

[10] In the **Criminal Trial Handbook**, The Honourable Roger E. Salhany, Carswell, 1992, states at pp. 3-4:

An accused who insists on appearing without counsel should be advised by the trial judge of the following:

- (a) of the right to cross-examine the witnesses for the prosecution;
- (b) of the right, at the close of the prosecution, to remain silent or to give evidence on their own behalf and that the accused is liable to be cross-examined if he or she does;
- (c) of the right to call witnesses in the accused's own defence and of the right to make submissions on any issue raised in the course of the trial: **Aucoin**, [1979] 1 S.C.R. 554;
- (d) of the right at the end of the trial to make submission to the jury, or in the case of trial by judge alone, to the presiding judge.

The Supreme Court of Canada dismissed the appeal "for the reasons given by Chief Justice Clarke".

[260] In **R. v. Phillips**, [2003] A.J. No. 14 (A.C.A.), affirmed [2003] 2 S.C.R. 623, the Supreme Court of Canada dismissed the appeal with short reasons:

Like the majority of the Court of Appeal of Alberta, we believe the accused had a fair trial. The appeal was dismissed.

In the Court of Appeal, Justice Fruman elaborated on the principles governing the assistance by a trial judge to an unrepresented litigant:

20 While advising about elements of offences at the beginning of a trial may be a sensible practice, it is clear from the case law that there is no requirement to intone particular words of advice at a specific time in order for a trial to be fair. In fact, this court has resisted prescribing a list of items that must be recited to an unrepresented accused before proceeding with a trial: **R. v. Hardy** (1991), 84 Alta. L.R. (2d) 362 at 363 (C.A.). In that case the proposed list included such "basic" advice as informing the accused of his right to be represented by a lawyer, explaining that the assistance of a lawyer may be important to ensure that his defence is placed fully before the court, and ascertaining that the accused did not wish to be represented by a lawyer: **R. v. Hardy** (1990), 79 Alta. L.R. (2d) 211 at 217 (Q.B.). Major J.A., on behalf of this court, rejected this list, noting that it does not have general application and is not binding on other Alberta trial judges. The lower court in **Hardy** also suggested that "[i]n many cases the goal of adjudicative fairness will not be served unless the judge explains the elements of the offence charged": *id.*, at 226. While this statement was not the subject of explicit comment by the Court of Appeal, it certainly rejected the notion that specific substantive or procedural advice is a prerequisite to a fair trial. Major J.A. indicated that "the question of fairness of the trial of an accused is a matter of fact in each case. It is an important function that is discharged by the trial judge and his discretion should neither be fettered nor interfered with": **Hardy** (C.A.), *supra*, at 363.

21 The Ontario Court of Appeal generally agreed with Major J.A. in a case in which an accused elected to proceed to trial with a legal agent instead of a lawyer: **R. v. Romanowicz** (1999), 138 C.C.C. (3d) 225. The court accepted that inquiries along the line of the "basic" advice described in **Hardy** (Q.B.), *supra*, may protect trial fairness by ensuring that the accused is aware of the significance of his decision to retain a legal agent and makes an informed choice to do so, although the "exact details of the requisite inquiry" depend on the circumstances of each case: **Romanowicz** at 241. The court in **Romanowicz** did not comment on or accept the notion that a judge is required to explain the elements of the offences at the commencement of trial.

22 Perhaps some judges are beguiled by the consistency and simplicity of boiler-plate language. But trials involving unrepresented accuseds are rarely consistent or simple. Their need for guidance varies depending on the crime, the facts, the defences raised and the accused's sophistication. The judge's advice

must be interactive, tailored to the circumstances of the offence and the offender, with appropriate instruction at each stage of a trial.

23 How far a trial judge should go in assisting an accused is therefore a matter of judicial discretion: **McGibbon**, *supra*, at 347. The overriding duty is to ensure that the unrepresented accused has a fair trial. Consistent with that duty, the judge "is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect": *id.*

24 The scope of a trial judge's assistance to an unrepresented accused "is limited to what is reasonable and cannot and does not extend [...] to provision of the kind of advice that counsel could be expected to provide": **Rain**, *supra*, at 179 (internal citations omitted). A judge must exercise great care not to descend from the bench and become a spectre at the accused's counsel table, placing himself "in the impossible position of being both advocate and impartial arbiter": **R. v. Taubler** (1987), 20 O.A.C. 64 at 71. For example, while a judge can assist an unrepresented accused by making general suggestions about possible avenues for cross-examination, he cannot actually conduct the type of cross-examination that would be expected from defence counsel: **R. v. Turlon** (1989), 49 C.C.C. (3d) 186 at 191 (Ont. C.A.); **R. v. B.K.S.** (1998), 104 B.C.A.C. 149 at 158-159. Nor can a judge become a tactical advisor: **R. v. K. (E.)** (1999), 181 D.L.R. (4th) 210 at 213 (B.C.C.A.). A judge is therefore required to respect an unrepresented accused's strategy in conducting his defence.

25 In cases in which the trial judge's guidance is alleged to have been inadequate, trial fairness is determined by considering whether the lack of guidance compromised the unrepresented accused's ability to properly bring out his defence. The actions of the trial judge must be carefully evaluated in the light of "the sophistication of the accused, the seriousness of the offence, the nature of the defence, and many other factors individual to each case": **R. v. Parton**, [1994] B.C.J. No. 2098 at para. 33 (Sup. Ct.). "[T]he Court is obliged to take into account the totality of the circumstances": **R. v. Khanoukaev**, [2001] O.J. No. 2031 at para. 28 (Sup. Ct. of Justice). Because it is often possible to argue that a trial judge "could have or should have given the accused more detailed or helpful advice and assistance than was in fact given [...] the force of such an argument must depend on the facts and circumstances": **Taubler**, *supra*, at 73.

26 It is clear that when appellate courts consider lack of guidance claims, they must ascertain trial unfairness by a careful and detailed examination of the complete trial record. See **McGibbon**, *supra*; **Hardy** (Q.B.), *supra*, aff'd on this point; **R. v. King** (S.J.) (1993), 61 O.A.C. 228, leave to appeal to S.C.C. refused, [1993] S.C.C.A. No. 236, [1993] 3 S.C.R. vii; **R. v. Kennie** (G.D.) (1993), 121

N.S.R. (2d) 91 (C.A.); **R. v. Jones (S.L.)** (1994), 154 A.R. 118 (Q.B.); **Parton, *supra*; R. v. Halnuck** (1996), 107 C.C.C. (3d) 401 (N.S.C.A.), aff'd (1997), 113 C.C.C. (3d) 478 (S.C.C.); **B.K.S., *supra*; Khanoukaev, *supra*; R. v. Innocente (D.J.)** (2000), 185 N.S.R. (2d) 1 (C.A.); **R. v. Tran** (2001), 55 O.R. (3d) 161 (C.A.).

[261] In **R. v. Landry**, 2003 NSCA 44 at ¶ 38-43 this court adopted the principles from **Phillips** and from **Kennie** and **McGibbon** cited in the above passages.

[262] In **R. v. Hazout**, [2005] O.J. No. 3550 (C.A.), Gillese, J.A. stated (¶ 37):

37 Ultimately, the question of adequacy of assistance is a matter of determining whether the trial judge ensured that the self-represented accused received a fair trial and was provided with sufficient guidance so that the accused could fully bring out his or her defence. How much guidance is required is a question of fact dependant on the circumstances of each case. See **R. v. Tran** (2001), 55 O.R. (3d) 161 (C.A.).

[263] The overall question is whether the assistance by the trial judge sufficed to guide Mr. Assoun through the trial in such a manner that his defence was brought out with its full force and effect. This depends on the circumstances of the case. Though the trial judge has discretion, there is an objective standard - the right to a fair trial. In **Wolkins**, 2005 NSCA 2 (CanLII), this court discussed the interplay of the discretion and the objective standard of trial fairness:

83 How the judge discharges these obligations must be left to the sound judicial discretion of the presiding judge. Providing that the discretion is exercised in accordance with the correct legal principles, a failure by the judge to discharge these obligations is not, of itself, a free-standing ground of appeal. The question is whether the failure has occasioned a miscarriage of justice.

84 This last point is made in **Romanowicz** and it bears repeating. As the court made clear in para. 40, the overriding concern is the fairness of the trial. The sorts of steps just discussed will help ensure a fair trial both in fact and in appearance. But as the Court emphasized, the important question on appeal is not simply whether these steps were or should have been taken, but whether any failure to take them has given rise to a miscarriage of justice.

85 The nature of the advice and assistance provided by the judge can only be assessed in light of the requirement for a fair trial in the particular case and cannot be captured by any specific, binding guidelines as to what that advice and

assistance ought to consist of. The fairness of a trial is a matter of fact in each case. The question on appeal is the fairness of the trial and that must be determined in light of the specific facts of each case: **Romanowicz** at paras. 36-41; **R. v. Hardy** (1991), 69 C.C.C. (3d) 190 (Alta. C.A.) *per* Major, J.A. (as he then was) at 191; **R. v. Landry** (2003), 174 C.C.C. (3d) 326 (N.S.C.A.) at para. 39; and, **R. v. Phillips** (2003), 172 C.C.C. (3d) 285; [2003] A.J. No. 14 (Q.L.) (C.A.) at para. 26.

[264] As noted in **Wolkins**, a trial judge's inadequate assistance is not a free-standing ground of appeal. The question is whether there has been a miscarriage of justice under s. 686(1)(a)(iii). In **Wolkins** the court explained that a miscarriage of justice can occur either because the trial was unfair or because the conduct of the trial shakes public confidence in the administration of justice:

89 The clearest example is the conviction of an innocent person. There can be no greater miscarriage of justice. Beyond that, it is much easier to give examples than a definition; there can be no "strict formula ... to determine whether a miscarriage of justice has occurred": **R. v. Khan**, [2001] 3 S.C.R. 823 *per* LeBel, J. at para. 74. However, the courts have generally grouped miscarriages of justice under two headings. The first is concerned with whether the trial was fair in fact. A conviction entered after an unfair trial is in general a miscarriage of justice: **Fanjoy**, *supra*; **R. v. Morrissey** (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at 220-221. The second is concerned with the integrity of the administration of justice. A miscarriage of justice may be found where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice: **R. v. Cameron** (1991), 64 C.C.C. (3d) 96 (Ont. C.A.) at 102; leave to appeal ref'd [1991] 3 S.C.R. x.

[265] In considering these issues, it is necessary to mind another basic principle. The trial judge is to control the trial process by applying the rules of procedure and evidence: **Wolkins**, ¶ 82. In **R. v. Snow** (2004), 190 C.C.C. (3d) 317 at ¶ 24 the Ontario Court of Appeal stated:

[24] On the other hand, a trial judge is certainly entitled to control the proceedings and to intervene when counsel fail to follow the rules or abide by rulings. A trial judge is not a mere observer who must sit by passively allowing counsel to conduct the proceedings in any manner they choose. It is well recognized that a trial judge is entitled to manage the trial and control the procedure to ensure that the trial is effective, efficient and fair to both sides: see **R. v. Felderhof** (2003), 180 C.C.C. (3d) 498 (Ont. C.A.), at paras. 36-47, 53; **R.**

**v. Valley** (1986), 26 C.C.C. (3d) 207 (Ont. C.A.) at 230-32; **R. v. G. (A.)** (1998), 130 C.C.C. (3d) 30 (Ont. C.A.), at paras. 41-54.

[266] The rules of procedure and evidence, and the trial judge's responsibility to apply them, promote trial fairness and encourage confidence in the administration of justice.

c. the trial judge's assistance to Mr. Assoun

[267] The trial judge explained the burden and standard of proof, the procedure of a criminal prosecution, the elements of the offence, the trial judge's responsibility to an unrepresented party and the trial judge's responsibility to control the trial. She explained this at the outset and repeated aspects of this advice on several occasions throughout the proceeding. The trial judge outlined the concept of reasonable doubt. She explained the nature of an opening statement, that Mr. Assoun could call witnesses and the procedure for examining witnesses.

[268] The trial judge explained that only evidence stated or identified by a sworn witness could be cited to the jury as factual. She repeated this point numerous times throughout the trial, as Mr. Assoun often attempted to give evidence or address the jury.

[269] The trial judge stated repeatedly that Mr. Assoun could choose to testify but that he need not testify and, if he did testify, he would be cross-examined by the Crown on all aspects of the case. She advised Mr. Assoun to obtain legal advice on whether or not to testify.

[270] The trial judge explained the nature of the closing statement, and again reminded Mr. Assoun that the only facts to be recited were those that were supported by testimony or documents in evidence.

[271] The trial judge explained the process of a jury charge.

[272] The trial judge gave Mr. Assoun adjournments to allow Mr. Assoun to prepare or to bring his witnesses to the court. She explained how to subpoena witnesses and how to have the subpoenas served.

[273] The trial judge explained the nature of direct evidence, cross-examination and redirect evidence. The trial judge explained how Mr. Assoun could phrase questions to elicit facts within the witness' knowledge and without calling for speculation. She assisted Mr. Assoun throughout the trial on how to phrase his questions properly.

[274] The trial judge explained specific evidentiary issues as they arose during the trial. These points included the exclusion of hearsay evidence, the exclusion of evidence where the prejudice to Mr. Assoun could exceed the probative value, how to question respecting inconsistent statements, how to contradict a witness with a statement of another witness, and how to question the witness concerning the witness' criminal record.

[275] The trial judge explained what Mr. Assoun had to establish to adduce admissible evidence respecting third party suspects. Copies of the case law were provided by the Crown to Mr. Assoun and the key passages stating the principles were quoted on the record for Mr. Assoun's benefit.

[276] The trial judge outlined *voir dire* procedure. She explained how Mr. Assoun should phrase his questions to refresh a witness' memory. She explained the nature of leading questions and how to request permission to ask an omitted question after the close of direct testimony. She explained how to qualify an expert witness, and how a party's own witness could be declared adverse to allow cross-examination.

[277] The trial judge repeatedly advised Mr. Assoun about the nature of character evidence. The Crown had not placed Mr. Assoun's "bad character" in issue. Mr. Assoun attempted to elicit evidence showing his "good character". The trial judge explained that, if Mr. Assoun placed character in issue, this could permit the Crown to adduce evidence respecting Mr. Assoun's bad character. The trial judge did not suggest that Mr. Assoun should or should not pursue character evidence, but made Mr. Assoun aware of the risk.

[278] As would occur in any trial, the trial judge outlined the defence theory in her jury charge.

d. Mr. Assoun's submissions

[279] Counsel for Mr. Assoun says that the trial judge exhibited a pattern of conduct which, taken as a whole, rendered the trial unfair. Mr. Assoun's principal complaints are the following. The trial judge interfered with Mr. Assoun's examination of witnesses. The trial judge, under the eyes of the jury, had Mr. Assoun removed from the courtroom. She interrupted Mr. Assoun's closing address, in the presence of the jury. The trial judge, within the hearing of the jury, commented on Mr. Assoun's failure to testify, which counsel says breached s. 4(6) of the **Canada Evidence Act**. Mr. Assoun says that the trial judge failed to advise him on how to tender evidence of third party suspects. After disallowing one of Mr. Assoun's questions relating to an unadmitted police report, the trial judge said that the proper method for Mr. Assoun to introduce the evidence could be discussed in the absence of the jury; but she did not raise the topic again. Mr. Assoun's factum says:

329. While no one error of the trial judge in failing to provide adequate assistance to the unrepresented accused may be determinative the Appellant submits that these errors had to have a cumulative effect which interfered with the Appellant's right to a fair trial.

[280] We will discuss these items individually and then the cumulative effect.

[281] The trial judge sustained many objections from the Crown during Mr. Assoun's examination of witnesses. That is because Mr. Assoun's questions were objectionable. Mr. Assoun's submissions on the appeal do not challenge the validity of the trial judge's rulings, based on the rules of evidence. There is no legal principle that an unrepresented party may introduce inadmissible evidence before a jury. When the trial judge disallowed Mr. Assoun's improper questions, she usually explained to Mr. Assoun the reason for the ruling and, when necessary, suggested how the question could be phrased.

[282] Mr. Assoun's removal from the courtroom is reflected in the following passage from the transcript (p. 2364):

MR. MACRURY      The Crown calls Cst. Williams.

MR. ASSOUN Back in June, I told the court that I'm wrongfully imprisoned –

THE COURT Mr. Assoun, you're not to address the jury –

MR. ASSOUN [inaudible] there's so much being hid from you that you –

THE COURT [inaudible] Take him out of the court, take him out.

MR. ASSOUN There's too much -- there's too much being hid –

THE COURT [inaudible]

[Inaudible discussion]

THE COURT We'll adjourn until Mr. Assoun is back in the courtroom. Sorry.

[283] This exchange occurred after many cautions from the trial judge that Mr. Assoun was not to address the jury or give evidence from the counsel table. Mr. Assoun's removal from the courtroom, in the presence of the jury, occurred solely because Mr. Assoun flouted the trial judge's directions. Had Mr. Assoun not been removed from the courtroom, and continued with his address, the result may have been a mistrial.

[284] Similarly, the trial judge interrupted Mr. Assoun's closing address to warn Mr. Assoun that he should cease stating facts that were not in evidence.

[285] During Mr. Assoun's closing address, the following exchange occurred:

MR. MacRURY My Lady, I loathe to object at this point, but Mr. Assoun the last while is getting back into giving evidence –

THE COURT Giving evidence.

MR. MacRURY -- and that is not appropriate in a closing. I apologize to the Court for the interruption.

THE COURT Yeah, I know. I have been –

MR. ASSOUN It's hard to explain.

THE COURT Mr. Assoun, you know you are not to give testimony.

MR. ASSOUN I don't mean to, Your Honour.

THE COURT But you've talked about I knew, I did, I this, I that. That's you testifying, Mr. Assoun, and *you didn't take the stand and testify*, and you cannot do it now.

I'm going to remind the jury again, disregard the statements that Mr. Assoun has just made. They are not evidence, and you are to utterly disregard them.

(Emphasis added)

Mr. Assoun's counsel points to the trial judge's italicized words, "you didn't take the stand and testify." Mr. Assoun's counsel says that the trial judge's comment breached s. 4(6) of the **Canada Evidence Act**.

[286] Section 4(6) of the **Canada Evidence Act** states:

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

[287] In **R. v. Potvin**, [1989] 1 S.C.R. 525 at pp. 557-8, Justice Wilson stated:

As the Court of Appeal noted, this Court has interpreted s. 4(5) of the **Canada Evidence Act** as requiring something more than an off-hand reference to the fact that an accused did not testify at trial. Ritchie J. interpreted s. 4(5) in a purposive as opposed to a literal manner in **McConnell and Beer v. The Queen**, [1968] S.C.R. 802, at p. 809:

I think it is to be assumed that the section in question was enacted for the protection of accused persons against the danger of having their right not to testify presented to the jury in such fashion as to suggest that their silence is being used as a cloak for their guilt.

48 Given this approach, which I approve and believe to be consistent with the approach to statutory interpretation enunciated by this Court in **R. v. Paré**, [1987] 2 S.C.R. 618, I do not think it can be said that the comments to which the appellant draws attention constitute a violation of s. 4(5) of the **Canada Evidence**

**Act.** As the Court of Appeal noted, the first passage is part of a general direction to the jury at the beginning of the judge's charge. The second passage is taken from the concluding part of the judge's charge but seems to be somewhat ambiguous and, in the context, in the nature of an off-hand remark. Even if the remark could have prejudiced the accused it was, in my view, more than compensated by the trial judge's unambiguous and sustained comments throughout the charge concerning the burden on the Crown to prove the guilt of the accused. I conclude, therefore, that the trial judge did not violate s. 4(5) of the **Canada Evidence Act** in these passages from his charge to the jury.

Similarly, in **R. v. R.C.C.**, [1996] N.S.J. No. 198 (C.A.), Justice Bateman stated:

[34] As is clear from **Potvin**, *supra*, the purpose of s. 4(6) is to prevent a trial judge from telling a jury, directly or in effect, that they may draw an adverse inference from the failure of an accused to testify.

To the same affect, **R. v. Diu**, [2000] O.J. No. 1770 (Ont. C.A.), at ¶ 179.

[288] The trial judge's comments did not suggest that Mr. Assoun's failure to testify was a "cloak for guilt" or the source of an adverse inference. Rather the trial judge explained to Mr. Assoun the basic principle that he could not, in his closing address, relate facts that had not been entered into evidence. This does not breach s. 4(6) of the **Canada Evidence Act**.

[289] The trial judge advised Ms. Assoun at length on the principles governing admission of evidence of third party suspects. This is discussed elsewhere in this decision (¶ 315 and 320).

[290] During the cross-examination of Jane Downey, Mr. Assoun referred to facts contained in a police report which was not in evidence. The trial judge ruled the question inadmissible and said:

**THE COURT** Well, then somebody should put - then you should - you might want to consider somehow getting into evidence. But you can't get it into evidence by asking this question.

**MR. ASSOUN** How can I get it into evidence, Your Honour.

**THE COURT** We can discuss that in the absence of the jury.

Neither the trial judge nor Mr. Assoun raised the issue again.

[291] It would have been preferable had the trial judge returned to the police report, in the absence of the jury, to advise Mr. Assoun specifically how he could enter that document into evidence. The lapse did not affect the fairness of the trial. The trial judge advised Mr. Assoun several times that evidence should be entered through a witness with personal knowledge of the evidence. She had advised Mr. Assoun how to arrange the issuance and service of subpoenas, with which the Crown had offered to assist if requested by Mr. Assoun. Mr. Assoun did not return to the topic of the police report. Had he done so, no doubt the trial judge would have repeated her advice that Mr. Assoun subpoena a witness with knowledge.

[292] There was a pattern manifested by the trial judge's evidentiary rulings, removal of Mr. Assoun from the courtroom, and interjection during Mr. Assoun's closing address. It is not the cumulative pattern of trial unfairness, suggested by Mr. Assoun. Rather, it is the trial judge maintaining control over the proceedings to ensure that the facts presented to the jury were only those reflected by properly admitted evidence.

[293] As the trial progressed, the trial judge expressed the view that Mr. Assoun understood the rules but chose to disregard them:

Mr. Assoun, I can't believe you don't understand that now. (transcript p. 3241)

Mr. Assoun, I'm beginning to think that you understand perfectly well what I told you yesterday about re-examination and that you're doing this on purpose.  
(transcript p. 3767)

Mr. Assoun, if you do this again, I'm going to have to send the jury out and speak to you ... you - I told you that. You know that. (transcript p. 3950)

[294] The rules of evidence and trial procedure exist to promote a fair trial. The trial judge is supposed to see that those rules are respected whether or not the accused has counsel. The trial judge's efforts here do not support any ground of appeal.

## **10. Application to Admit New Evidence**

[295] Mr. Assoun asked this court to admit as fresh evidence on the appeal:

- (i) Mr. Assoun's affidavit dated April 21, 2005
- (ii) Mr. Fred Fitzsimmons' affidavit dated May 5, 205
- (iii) excerpts from the Crown disclosure package which includes statements or notes of interviews or investigations conducted by police office
- (iv) the affidavit of Fred Fitzsimmons dated July 7, 2005
- (v) a memorandum of Detective Wayne Hurst dated May 19, 2005
- (vi) copies of newspaper reports dated between March 21 and April 25, 2000 and May 29, 2001

[296] The first three items relate to the possibility that Brenda Way's murder was committed by Avery Greenough, Robert George Poole or Ashley Herridge. The latter three relate to the possibility that Ms. Way's murder was committed by Michael McGray. Later we will review the contents of these materials.

[297] Section 683(1) of the **Criminal Code** allows the appeal court to receive fresh evidence in "the interests of justice". In **Wolkins**, this court reviewed the principles:

57 Both the SCAC and this Court have a wide discretion to admit new evidence on appeal where it is in the interests of justice: **Criminal Code**, s. 683(1). Case law has structured the exercise of this discretion in the various contexts in which new evidence may be advanced.

58 Fresh evidence tends to be of two main types: first, evidence directed to an issue decided at trial; and second, evidence directed to other matters that go to the regularity of the process or to a request for an original remedy in the appellate court. The legal rules differ somewhat according to the type of fresh evidence to be adduced. Mr. Wolkins advances evidence of both types.

59 Fresh evidence on appeal which is directed to issues decided at trial generally must meet the so-called **Palmer** test. A key component of that test requires that the proposed fresh evidence could not have been available with due diligence at trial: **R. v. Palmer**, [1980] 1 S.C.R. 759 at 775. This rule makes it

clear that the place for the parties to present their evidence is the trial. If evidence that with due diligence could have been called at trial were admitted routinely on appeal, finality would be lost and there would be less incentive on the parties to put forward their best case at trial. The rule requiring due diligence at trial is therefore important because it helps to ensure finality and order, two features which are essential to the integrity of the criminal process: **R. v. G.D.B.**, [2000] 1 S.C.R. 520 at para. 19. In that paragraph of **G.D.B.**, the Supreme Court adopted these words of Doherty, J.A. in **R. v. M.(P.S.)** (1992), 77 C.C.C. (3d) 402 at 411:

While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the **Criminal Code** encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the **Code** recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: **McMartin v. The Queen**, [1964] S.C.R. 484, *supra*, at p. 148.

The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal.

In my view, these considerations are equally relevant in the context of an appeal from sentence. Accordingly, due diligence in producing fresh evidence is a factor that must be taken into account in an appeal from sentence, on the same basis as the other three criteria set out in **Palmer**.

60 But finality and order, important as they are, must give way in the interests of justice. Accordingly, the due diligence criteria is not applied inflexibly and yields where its application might lead to a miscarriage of justice: **R. v. G.D.B.**, *supra*, at paras. 17-21; **R. v. Lévesque**, *supra*, at para. 15. The due diligence requirement is one factor to be considered in the "totality of circumstances": **G.D.B.** at para. 19. In considering whether the due diligence requirement has been met, the appellate court should determine the reason why the evidence was not

available or was not used: **G.D.B.** at para. 20. The absence of an explanation or the fact that the failure to call the evidence was a deliberate tactical choice will weigh against its admission: **R. v. Warsing**, [1998] 3 S.C.R. 579 at para. 51.

61 The other category of fresh evidence concerns evidence directed to the validity of the trial process itself or to obtaining an original remedy in the appellate court. In these sorts of cases, the **Palmer** test cannot be applied and the admissibility of the evidence depends on the nature of the issue raised. For example, where it is alleged on appeal that there has been a failure of disclosure by the Crown, the focus is on whether the new evidence shows that the failure may have compromised trial fairness: see **R. v. Taillefer; R. v. Duguay**, [2003] 3 S.C.R. 307 at paras. 73-77. Where the appellant seeks an original remedy on appeal, such as a stay based on abuse of process, the evidence must be credible and sufficient, if uncontradicted, to justify the appellate court making the order sought: see e.g. **United States of America v. Shulman**, [2001] 1 S.C.R. 616 at paras. 43-46. Where the appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see **R. v. G.D.B.**, *supra*.

[298] Mr. Assoun tenders the fresh evidence under both approaches described in **Wolkins**, ¶ 58. He says that the evidence should be admitted: (a) to support his challenge to the jury's verdict under the test in **R. v. Palmer**, [1980] 1 S.C.R. 759; and, alternatively, (b) to support his challenge to the fairness of the trial process.

a.      fresh evidence re trial verdict

[299] In **Palmer**, at p. 775, the Supreme Court said that the "interests of justice" in s. 683(1)(d) are governed by four factors:

- (1)     The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. ...
- (2)     The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3)     The evidence must be credible in the sense that it is reasonably capable of belief, and,

- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

To the same effect: **May v. Ferndale Institution**, 2005 SCC 82 at ¶ 107.

[300] The first **Palmer** factor, “due diligence”, may be relaxed in “the interests of justice” under the overriding statutory standard: **R. v. Warsing**, [1998] 3 S.C.R. 579, at ¶ 56; **R. v. G.D.B.**, [2000] 1 S.C.R. 520, at ¶ 19; **R. v. Owen**, [2003] 1 S.C.R. 779 at ¶ 52-3; **R. v. 1275729 Ontario Inc.**, [2005] O.J. No. 5515 (C.A.) at ¶ 28-29. The Crown’s pretrial disclosure to Mr. Assoun’s counsel discussed Messrs. Greenough, Poole and Herridge. The Crown says that “due diligence” forecloses the submission of fresh evidence on the appeal related to these persons. Mr. Assoun says that this would be too harsh for a murder charge against someone unrepresented by counsel during much of the trial. In our view the application to admit fresh evidence fails for other reasons, as will be discussed. We make no comment on the “due diligence” criterion.

[301] The evidence could only affect the result, under the fourth **Palmer** factor, if it is admissible. The test for admission of evidence showing third party involvement was outlined in **R. v. MacMillan** (1975), 23 C.C.C. (2d) 160 (Ont. C.A.), affirmed [1977] 2 S.C.R. 824 and **R. v. Grandinetti**, [2005] 1 S.C.R. 27. In **Grandinetti**, Justice Abella stated:

46 Evidence of the potential involvement of a third party in the commission of an offence is admissible. In **R. v. McMillan** (1975), 7 O.R. (2d) 750 (C.A.), aff'd [1977] 2 S.C.R. 824, Martin J.A. stated the simple underlying premise to be:

[I]t [is] self-evident that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X. [p. 757]

However, as he explained, the evidence must be relevant and probative:

Evidence directed to prove that the crime was committed by a third person, rather than the accused, must, of course, meet the test of relevancy and must have sufficient probative value to justify its reception. Consequently, the Courts have shown a disinclination to admit such evidence unless the third person is sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value. [p. 757]

47 The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation.

48 The defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence: **R. v. Fontaine**, [page 43] [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 70. If there is an insufficient connection, the defence of third party involvement will lack the requisite air of reality: **R. v. Cinous**, [2002] 2 S.C.R. 3, 2002 SCC 29.

In **MacMillan**, Martin, J.A. stated:

Obviously, unless the third person is connected with the crime under consideration by other circumstances, evidence of such person's disposition to commit the offence is inadmissible on the grounds of lack of probative value.

To the same effect **R. v. Arcangioli**, [1994] 1 S.C.R. 129 at pp. 139 - 40.

[302] Further, the proffered fresh evidence must be in admissible form. Otherwise it could not have affected the result under the fourth **Palmer** factor. In **R. v. O'Brien**, [1978] 1 S.C.R. 591, Dickson, J. stated:

Section 610 of the **Criminal Code** lends no assistance to respondent's case. It is a prerequisite that any evidence sought to be adduced under the discretion granted by that section be admissible evidence. The section manifestly does not authorize a Court of Appeal to dispense with the law of hearsay evidence. If that were so we would have the anomalous situation in which counsel could seek to adduce on appeal that which the common law prohibits at trial. The section is not operative until the threshold for admissibility as defined by common law and statute is crossed. That threshold has not been crossed in the instant case.

An example is **R. v. Dell**, [2005] O.J. 863 (O.C.A.), per Sharpe, J.A. at ¶ 85:

85 Most of the material in the Crown brief relied upon by the appellant is unsworn, inadmissible hearsay. The appellant submits that Keyes' sworn videotaped statement is not hearsay. I disagree. That statement was given at another time for another purpose; indeed, it was given when Keyes was the subject of an investigation for conspiracy to murder Kim Knott. It is not evidence sworn for the purpose of this appeal. Requiring an affidavit sworn in the particular

proceeding offering first hand evidence is not a mere formality. It appropriately directs the mind of the witness to the precise reason for which the evidence is offered and provides a means whereby the responding party can test the evidence by way of cross-examination. A statement given under oath at another time and for another reason does not satisfy these important safeguards.

To similar effect: **R. v. Kelly**, [1999] N.B.J. No. 98 (C.A.) at ¶ 71.

[303] We will apply these principles to Mr. Assoun's proffered fresh evidence.

[304] Mr. Assoun tenders as fresh evidence his own affidavit, saying the following. He is an inmate at Dorchester Penitentiary. He was arrested in British Columbia in March 1998. He describes his legal representation by his former counsel, Mr. Murray and his discharge of Mr. Murray early in the trial. He tried to retain another counsel, Mr. Atherton, without success. He represented himself at the trial. He has grade 6 education with no legal training. He said that the Crown provided disclosure information to Mr. Murray before the trial. Mr. Assoun said that some of the material disclosed to Mr. Murray was disclosed to Mr. Assoun before the trial and the rest was disclosed to Mr. Assoun after June 4, 1999 when Mr. Murray was discharged. Mr. Assoun said that he had difficulty preparing for the trial while he was an inmate. He relates the facts concerning the appointment of his counsel on the appeal. Mr. Assoun said that he retained Mr. Fred Fitzsimmons, a private investigator, to review his case. He did not adduce evidence of third party involvement in Ms. Way's murder because, Mr. Assoun says, he was inadequately advised on the topic by the trial judge.

[305] Mr. Fitzsimmons' affidavit of May 5, 2005 says that he is a retired RCMP officer, now a private investigator. He reviewed the Crown disclosure files and other information provided to him by the appeal counsel for Mr. Assoun. He spoke to certain persons, some named, others anonymous. He criticizes the thoroughness of the police investigation, especially with respect to third party suspects. Mr. Fitzsimmons says that in his opinion, Mr. Greenough, Mr. Poole and Mr. Herridge were "good suspects". Mr. Fitzsimmons reviewed his interviews and the contents of the reviewed files to attempt to show connections between Messrs. Greenough, Poole and Herridge and the murder of Brenda Way. Later we will summarize the suggested connections.

[306] Mr. Fitzsimmns filed a second affidavit, also tendered as fresh evidence, dated July 7, 2005. This affidavit deals with Michael McGay. Messrs. Greenough, Poole and Herridge were known to the police, and were discussed in the documents disclosed by the Crown to Mr. Assoun's counsel before the trial. Mr. McGay was not known to the Crown or to the defence until after the trial. Mr. Assoun has tendered as fresh evidence copies of press reports that Mr. McGay was a convicted killer who admitted to killing 16 people in Canada and United States. Mr. Fitzsimmons' affidavit states that he was told by Mr. McGay's girlfriend that Mr. McGay resided in the neighbourhood where Ms. Way was murdered, from February 1995 onward. Mr. Fitzsimmons says that he was told by an unnamed person that Mr. McGay resided several minutes walk from where Ms. Way's body was found. Mr. Fitzsimmons refers to a memorandum of Detective Hurst of the Halifax Regional Police, dated May 19, 2005, where Detective Hurst says:

I acknowledge receipt of your faxed letter, marked as URGENT, dated May 13, 2005, which I received on May 16, 2005.

With respect to question #1, according to the documents that I have reviewed, it appears as though Michael McGay was not in custody, however, I can not determine where he was living at the time of Brenda Way's murder.

Based on a review of a Time Line Report created from CSC documents, it would appear as though McGay was living at 25 Highfield Park Drive, on February 9, 1995.

Based on a RAPID computer check, the last address we had listed for McGay prior to the Brenda Way homicide was on June 10, 1995, where it is recorded that McGay lived at 37 Brule Street, Apt #3, Dartmouth. (refer to file 95-7227 Dartmouth)

Both Brule Street and Highfield Park Drive are in the Jackson Road and Highfield Park area. I do not have any documents which would indicate where McGay was residing from June 10, 1995, until the time of Brenda Way's murder in November, 1995.

Based on a RAPID computer check, the next possible address we have McGay connected to is a Kent Street address in Halifax, on January 26, 1996. (refer to file 96-1990)

With respect to question #2, Dave MacDonald, the primary investigator of the Brenda Way file, stated he did not consider McGay to be a suspect in the Way murder.

I spoke to Cst. Steve Maxwell and Sgt. Dave Worrell, both of which had involvement with respect to investigating McGay. Sgt. Worrell had a Time Line of when McGay was not in custody, and based on the Time Line, it appeared as though McGay was not in custody at the time of the Way murder, and Sgt. Worrell had asked Cst. Maxwell to question McGay about the Way murder. Cst. Maxwell was also asked to question McGay about other murders where it appeared as though McGay was not in custody. Sgt. Worrell had no evidence that linked McGay to these files, including the Way murder, he was simply taking advantage of an opportunity to question McGay on murders that occurred while McGay was not in custody.

Regarding question #2, based on my information, Mr. McGay's method of killing involved knives (stabbing, cutting, one case of cutting victims throat not a prostitute), strangulation, and blunt force trauma. Based on my information there were no confirmed cases where Mr. McGay either plead guilty to, or admitted to, that involved prostitutes where the method of killing was cutting of the victim's throat with a knife.

Due to the urgent nature of this request it should be noted that both Sgt. Worrell and Cst. Maxwell provided this information without the benefit of reviewing the actual files, notes and other documents. They provided this information based on recollection only. Sgt. Worrell will be making further enquiries upon returning to duty and he may have additional information.

Due to the fact that the investigation into Mr. McGay has not concluded, although this does not involve the Brenda Way file, details of the investigation are confidential and not to be disclosed.

[307] As discussed earlier, it is clear from **O'Brien** and **Dell** that the tendered evidence must be in admissible form. Inadmissible evidence would not have affected the result at trial. This is an application to adduce evidence. It is not just a preview of topics which would be canvassed, through witnesses other than these deponents, if a new trial occurred. If the tendered evidence would be inadmissible at trial, it is inadmissible in the Court of Appeal.

[308] The point of the motion is to adduce evidence of third party suspects. Mr. Assoun's affidavit contains no relevant and admissible evidence respecting third

party suspects to Ms. Way's murder. His affidavit says nothing to indicate any personal knowledge of Messrs. Greenough, Poole, Herridge or McGay. Similarly, Mr. Fitzsimmons has no personal knowledge respecting the involvement of these four individuals in Ms. Way's murder. Mr. Fitzsimmons conducted interviews, some with unnamed persons, which he relates as hearsay in his affidavit. This is not evidence in admissible form. A statement or confession by a suspect, under certain conditions, may be admissible through a witness to the statement. But this does not adduce hearsay of that witness' evidence. For instance, with respect to Avery Greenough, Mr. Fitzsimmons says:

That in Cst. Veinot's notes dated December 4, 1995 he refers to a conversation with the manager of the Dartmouth Inn, Gerry Townsend, where Ms. Townsend stated that she heard from the staff that Avery Greenough spoke of slitting girls' throats.

Had Mr. Fitzsimmons attempted to say this at trial, his testimony would be rejected as multi-tiered hearsay. It is no more admissible in the Court of Appeal.

[309] Mr. Fitzsimmons' opinions that these individuals are "good" suspects are not admissible. If, at trial, Mr. Fitzsimmons had attempted to testify that other individuals were "good" suspects, his evidence would have been rejected as irrelevant.

[310] The third **Palmer** factor relates to credibility of the tendered evidence. The evidence is tendered as hearsay through Mr. Fitzsimmons. It is not Mr. Fitzsimmons' credibility which is at issue. Cross-examination of Mr. Fitzsimmons would not test the credibility of the sources in Mr. Fitzsimmons' affidavit. This highlights the importance of tendering the evidence in admissible form.

[311] Detective Hurst's statement respecting Mr. McGay is accepted as factual by the Crown. We will accept that stipulation to satisfy the criterion that the evidence be in admissible form.

[312] Could the tendered evidence have affected the result under **Palmer**'s fourth factor? Unless there was sufficient "connection" to the crime under **Grandinetti** and **MacMillan**, the third party suspect evidence would be inadmissible, and the answer would be "no".

- (i) With respect to Herridge, Mr. Fitzsimmons' affidavit refers to a statement by Mr. Herridge to police that early in the morning of November 12, 1995 Mr. Herridge picked up a woman on Albro Lake Road, that the woman wore a jacket like Ms. Way's, and that Mr. Herridge spent the night with this woman at his residence until 8:30 a.m.
- (ii) With respect to Poole, Mr. Fitzsimmons recounts that Mr. Poole was a violent sex offender who lived in Dartmouth at the time of Ms. Way's murder.
- (iii) With respect to Greenough, Mr. Fitzsimmons' affidavit says that Mr. Greenough associated with prostitutes, knew Ms. Way, was drinking at the Dartmouth Inn on the night in question, and had a criminal record of violence against women.
- (iv) Mr. McGay was an admitted serial killer across Canada and in the United States. Detective Hurst's statement respecting Mr. McGay relates that Mr. McGay was a convicted murderer, who was not in custody when Ms. Way was murdered, resided in Ms. Way's Dartmouth neighbourhood in June of 1995, five months before Ms. Way's murder, and resided in Halifax in January, 1996, two months after Ms. Way's murder.

[313] In **Grandinetti**, Justice Abella stated:

47 The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation.

[314] The suggested connections between these four suspects and Ms. Way's murder were flimsier than the connection considered in **Grandinetti** itself (S.C.R. ¶ 50-61). In **Grandinetti** the Supreme Court rejected the third party evidence as a "chain of speculation". In our view, the same can be said with respect to the alleged connections of Poole, Greenough, Herridge and McGay to the murder of Brenda Way. There may be disposition and proximity in the neighbourhood, but there is no connection to the circumstances of Ms. Way's murder. The evidence would be

inadmissible under **MacMillan** and **Grandinetti**. The evidence could not have affected the result under **Palmer**'s fourth criterion.

b. fresh evidence re trial fairness

[315] Mr. Assoun says the trial judge gave insufficient assistance to an unrepresented litigant specifically related to third party suspect evidence. His factum says:

316. The issue of third party suspects is an example of a crucial issue in this case where the trial judge failed to provide proper assistance and guidance. . . .

318. . . . The trial judge did not explain either the procedure which must be followed to lead evidence of third party suspects or the potential importance of the same.

Mr. Assoun's affidavit for the fresh evidence application says:

14. That other than my vague recollection of Avery Greenough these other names did not mean anything to me at the time. However, I did not know that I could raise the issues of other subjects at trial to show the biased nature of the police investigation or to attempt to raise a reasonable doubt. Mr. Kennedy explained the potential importance of this issue, but it was not obvious to me during my trial nor was it ever explained to me by the trial judge that this issue could be raised at trial, although it is my recollection that the discussion of other suspects came up very briefly, at least a couple of occasions during the trial.

As discussed earlier, Mr. Assoun tenders fresh evidence related to Avery Greenough, Robert Poole, Ashley Herridge and Michael McGray as suspects in Ms. Way's murder.

[316] As stated in **Wolkins**, an appeal court may, without regard to the **Palmer** criteria, accept fresh evidence in support of a ground of appeal that the accused was denied a fair trial. See also: **R. v. Taillefer**, [2003] 3 S.C.R. 307 at ¶ 75-78; **R. v. W.W.** (1995), 100 C.C.C. (3d) 225 (O.C.A.) at 232-33; **R. v. Peepeetch**, 2003

SKCA 76 at ¶ 4. In **R. v. Phillips**, [2003] A.J. No. 14 (A.C.A.), affirmed [2003] 2 S.C.R. 623, Fruman, J.A. for the majority stated:

27 The record may, by itself, demonstrate that the accused's ability to defend his case was compromised by the action or inaction of the trial judge. But it may not. Although the concept of trial fairness is flexible, there must be some air of reality to a potential defence. Therefore, an appellant may also apply to adduce additional evidence at the appeal stage to substantiate a claim that the trial was unfair. For example, an appellant might provide evidence to show that he would have done things differently, had he received particular advice: **Criminal Code** s. 683(1); **Hardy** (C.A.), *supra* at 363. Because such evidence is not directed at a finding made at trial, but challenges the validity of the trial process, admission of the evidence is not dependent on meeting the fresh evidence requirements set out in **Palmer v. The Queen**, [1980] 1 S.C.R. 759; R. v. W. (W.) (1995), 100 C.C.C. (3d) 225 at 232 (Ont. C.A.). See also **United States of America v. Shulman**, [2001] 1 S.C.R. 616 at 636.

[317] The fresh evidence tendered by Mr. Assoun does not relate to the actual process of this trial. It is evidence that, Mr. Assoun says, may implicate other individuals in the murder of Ms. Way. He says that, had the trial judge properly advised him as an unrepresented litigant, this evidence would have been before the jury. That is the suggested connection to the trial process. Before this evidence may be accepted on appeal without regard to the **Palmer** tests, Mr. Assoun must establish his premise that the trial judge failed to offer Mr. Assoun proper assistance with respect to evidence of third party suspects. Without the premise of trial unfairness, the fresh evidence really is being tendered to challenge the trial result, and must satisfy **Palmer**.

[318] Messrs. Greenough, Poole and Herridge were known as possible third party suspects before the trial. Before the trial, the Crown disclosed information relating to these persons to Mr. Assoun's counsel, Mr. Murray. Information respecting Mr. McGraw was unknown to either the Crown or to Mr. Assoun and his counsel until after the trial.

[319] Nothing indicates that the trial judge knew of any third party suspect evidence related to Messrs. Greenough, Poole, Herridge or McGraw. The trial judge was not privy to the Crown's pre-trial disclosures to Mr. Assoun and his counsel concerning Messrs. Greenough, Poole, Herridge, or to any information involving Mr. McGraw.

[320] Mr. Assoun's statement that the trial judge gave no assistance respecting the rules of evidence on third party suspects is incorrect. The trial judge and counsel for the Crown explained to Mr. Assoun, in detail, the requirements for the submission of evidence related to third party suspects. Copies of the case law were given to Mr. Assoun and passages from **MacMillan** and other authorities were quoted to Mr. Assoun. **Grandinetti** had not yet been decided. The trial judge explained to Mr. Assoun the test for the submission of evidence implicating third party suspects. These matters were related to Mr. Assoun twice. The discussion occupied many pages of the transcript. (Transcript pp. 3057-78, 3408, 3445-61.)

[321] There is no basis for the submission that the trial itself was unfair, or that the trial judge failed in any responsibility to assist Mr. Assoun with respect to the evidence of third party suspects.

[322] This court cannot accept the fresh evidence under the second prong of the test set out in **Wolkins** - ie., related to the trial process. The fresh evidence is relevant - if at all - to Mr. Assoun's challenge to the jury's verdict at the trial. Mr. Assoun's application to tender fresh evidence must stand or fall with the **Palmer** tests. As discussed, the fresh evidence does not satisfy the criteria in **O'Brien** and **Palmer**.

[323] We dismiss the application to tender fresh evidence.

## Conclusion

[324] We have found three instances where there was a minor or insignificant error in either the legal analysis leading to the admission of evidence or the improper admission of evidence: the reference to corroboration as a factor in determining threshold reliability (¶ 113-114); the failure to undertake a principled approach analysis to the individual statements of Ms. Way (¶ 116 - 131); and the admission of irrelevant evidence regarding the similarity of makes of trucks (¶ 211). In assessing the application of s. 686(1)(b)(iii), the curative proviso, it is necessary to consider the cumulative effect of the errors: **R. v. Klymchuk** (2005) 203 C.C.C. (3d) 341 (O.C.A.) at ¶ 47. As stated by Justice Doherty in **Klymchuk**:

48 Section 686(1)(b)(iii) eliminates the need for a new trial despite a legal error at the first trial where a new trial is not necessary to ensure the proper administration

of criminal justice. If the legal error casts no doubt on the reliability of the verdict, or the essential fairness of the trial, justice is not served by a new trial. Where the essential fairness of the trial is not undermined by the legal error, s. 686(1)(b)(iii) can only be applied to dismiss an appeal where the appellate court is satisfied, based on a review of the entirety of the trial record, that there is no reasonable possibility that the verdict would have been different had the legal error not been made: **R v. Bevan** (1993), 82 C.C.C. (3d) 310 (S.C.C.) at 328-329.

49 Where the error lies in the improper admission of evidence, that error will be harmless within the meaning of s. 686(1)(b) (iii) if the improperly admitted evidence was so insignificant that it could not have affected the verdict, or if the Crown's case apart from the improperly received evidence can be characterized as so overwhelming as to render a conviction almost inevitable: **R. v. Khan** (2001), 160 C.C.C. (3d) 1 (S.C.C.), at paras. 26, 31. If an appellate court finds legal error, it cannot pre-empt an accused's right to a trial according to law by an appellate evaluation of the appropriate or even likely verdict: **R. v. S. (P.L.)** (1991), 64 C.C.C. (3d) 193 (S.C.C.) at 199; **R. v. C. (W.B.)** (2000), 142 C.C.C. (3d) 490 (Ont. C.A.) at 513, aff'd (2001), 153 C.C.C. (3d) 575 (S.C.C.).

[325] In this case we are satisfied that the cumulative effect of the errors casts no doubt on the reliability of the verdict or the fairness of the trial. The errors in legal analysis were in our view slight and insignificant to the resolution of the admissibility issues. The improperly admitted irrelevant evidence was innocuous and could not have improperly influenced the verdict. Taken both individually and together we are confident that a new trial is not warranted. It is an appropriate case to apply the provisions of s. 686(10(b)(iii).

[326] For these reasons, the appeal is dismissed.

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Rosco

ton, J.A.

Hamil

ud, J.A.

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